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## RESTORING VITALITY TO STATE AND LOCAL POLITICS BY CORRECTING THE EXCESSIVE INDEPENDENCE OF THE SUPREME COURT

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### PREFACE

*This Article endorses the view of such political "conservatives" as Robert Bork, Pat Buchanan, Orrin Hatch, and Ed Meese that the Constitution of the United States is deeply flawed in conferring too large a political role on life-tenured Supreme Court Justices. It argues that a constitutional amendment to correct excessive judicial independence is long overdue, a conclusion, it contends, that ought to be shared by all who believe, as the author does, that the right to self-government is the parent right on which our civil liberties and the market economy ultimately de-*

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\* The theme of this Article was presented as part of the Daniel J. Meador Lecture at The University of Alabama School of Law on February 9, 1998. It is an extension of work done by the author over a period of thirty years, often in partnership with Professor Meador. It is a celebration of that delightful and stimulating collegueship. And I celebrate the memory of Maurice Rosenberg, a co-venturer, who would surely have straightened me out on the errors of judgment this Article must surely contain. I also salute Frank Strong, my fellow traveler in these matters, and my dean more years ago than he or I could possibly remember. I am grateful to Brooks Giles, Christopher Rae, and John Shepherd for able research assistance, and to David Currie, Alan Morrison, and Jefferson Powell for helpful reactions to earlier drafts.

*pend and that healthy institutions of self-government require substantial devolution of political power. The Article departs from the more radical remedies being suggested by the named "conservatives" to propose term limits for Supreme Court Justices and an empowerment of Congress in Section 5 of the Fourteenth Amendment to restore as well as limit some powers of state and local governments. The latter proposal may be likened to the Home Rule provisions commonly found in state constitutions.*

### I. JUSTICES: REFEREES OR COMPETITORS?

In 1829, John Marshall exuberantly told those drafting a new constitution for Virginia that a dependent judiciary is "the greatest scourge an angry Heaven ever inflicted upon an ungrateful and sinning people . . . ."<sup>1</sup> In 1996, his contemporary successor, in a similar moment of excess, proclaimed judicial independence "the crown jewel[] of our system of government . . . ."<sup>2</sup> It is true that the judicial "dependence" condemned by Chief Justice Marshall diminishes the value of all our rights by reducing the likelihood of their enforcement. Where there is no judicial independence, there is no law, only bribery and intimidation.<sup>3</sup> Moreover, experience teaches that where there is no law, there will be not only barbarism but diseconomy as well, for transactions cannot be safely planned to avoid the lash of violent power. Because these benefits of enforcing rights are obvious and pervasive, the United Nations Commission on Human Rights has declared, with the Chief Justices, that an independent judiciary is a basic human right.<sup>4</sup>

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1. John Marshall, Address to Virginia State Constitutional Convention of 1829-1830, *quoted in* O'Donoghue v. United States, 239 U.S. 516, 532 (1932).

2. William H. Rehnquist, Remarks on the Future of Federal Courts at the Centennial Celebration of the Washington College of Law at American University (Apr. 9, 1996) (transcript available at <<http://supct.law.cornell.edu/supct/justices/rehnau96.htm>>).

3. For Americans, this proposition was most vividly demonstrated by the broken promises of the French Revolution. Its notorious excesses followed the subordination of the judiciary, which had previously enjoyed a measure of independence from the royal government. See JOHN P. DAWSON, THE ORACLES OF THE LAW 369-71 (1968).

4. In 1948, the United Nations promulgated its Universal Declaration of Human Rights; Article X provided that "[e]veryone is entitled in full equality to a fair

Nevertheless, a Commission of the American Bar Association in 1997 despairingly reported "mounting evidence" of a loss of confidence in our courts and "a diminished understanding of the role of an independent judiciary in protecting the rights of the people."<sup>5</sup> That loss of confidence may be associated with a broad decline in Americans' confidence in their government at all levels and all branches. That concern is empirically demonstrable and is reflected in the reports of news media (who may bear substantial responsibility for it).<sup>6</sup> If the causes of this alarming decline are deeply cultural, there is little that mere lawyers can do to correct it.

On the other hand, there is one likely cause for our growing uncertainty about judicial independence that could be usefully confronted. It is that Americans seem increasingly to be legal realists<sup>7</sup> who have taken notice that high courts practice poli-

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and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." G.A. Res. 217(III)A, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 10, 1948). This provision was sweepingly elaborated in 1985 in the United Nations' statement of Basic Principles on the Independence of the Judiciary. See United Nations, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Independence of the Judiciary, U.N. Doc. A/Res/40/146 (Dec. 13, 1985), excerpts reprinted in CHERIF BASSIOUNI, *THE PROTECTION OF HUMAN RIGHTS IN THE ADMINISTRATION OF CRIMINAL JUSTICE: A COMPENDIUM OF THE UNITED NATIONS NORMS AND STANDARDS* 245-48 (1994). It is now contended that the principle has been elevated to one of international law binding on all nations. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4-19 (4th ed. 1990). See generally Allen N. Sultan, *Judicial Autonomy Under International Law*, 21 U. DAYTON L. REV. 585, 631-34 (1996) (describing the impact humanitarian intervention has had on the development of the law).

5. AMERICAN BAR ASSOCIATION, *AN INDEPENDENT JUDICIARY: REPORT OF THE COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE* vii (1997) [hereinafter *AN INDEPENDENT JUDICIARY*]; *Court Evaluation Surveys*, 82 JUDICATURE 60 (1998); N. Lee Cooper, President of the American Bar Association, Remarks to the American Law Institute (May 19, 1997), in *THE AMERICAN LAW INSTITUTE, REMARKS AND ADDRESSES* 21 (1997). But see John M. Scheb II & William Lyons, *Public Perception of the Supreme Court in the 1990s*, 82 JUDICATURE 66 (1998).

6. See generally JOSEPH A. CAPPELLA & KATHLEEN HALL JAMIESON, *SPIRAL OF CYNICISM: THE PRESS AND THE PUBLIC GOOD* (1997).

7. "Legal Realism" is a term of uncertain meaning that I will not attempt to clarify. Used in the text without capital letters, it signifies the penetration of the public awareness of the more moderate observations of lawyers, judges, and scholars, who have since the time of Blackstone known that judges of courts of last resort make law as well as find it. I do not imply that the public has bought into the legal nihilism advanced by Jerome Frank in his psychiatrization of the judicial process, *LAW AND THE MODERN MIND* (1935), and renewed in the "post-modern" age as

tics. If we were not otherwise already aware of it, that reality has been forced upon the public by journalists intent on showing us how our sausage is made, who seldom report a political utterance or a judicial decision without speculating on its underlying motive.<sup>8</sup> Also, we cannot fail to notice the extraordinary efforts of some hopefuls to secure high court judgeships, or to prevent others from securing them in the apparent hope of gaining control of a court much as one might hope to gain control of a legislature. If, indeed, we are all now realists about the relation of law to politics, then utterances unqualifiedly extolling judicial independence, as Chief Justices Marshall and Rehnquist, the UN, the ABA, and countless others have done, resemble the utterances of unavailing saviors who cry out for "Peace! Peace!" where there can be no peace. Such sentimentality evokes cynicism among us realists; its repetition is not merely unpersuasive, but harmful.

It of course bears emphasis that the Chief Justices, the United Nations, and the ABA have a point. It also bears emphasis that none of these worthies intended to declare that judges ought to be independent of the law. Law, as we understand it, requires judges be seen as referees, disinterestedly applying its texts to facts accurately discerned. As the rules of games universally confirm, referees' roles require not only dispassion by those who perform them, but civil acceptance and obedience by those who are disappointed by their decisions. A problem for our time is that we cannot help knowing that our highest courts are not merely enforcing rules (i.e., pre-existing legal texts or traditions). We know too well that they often shape the rules (i.e., legal doctrine) according to their own preferences to assist one rival interest or another. In short, they take sides on political issues every day and are not mere referees. Inasmuch as we can see them blocking and tackling while garbed in striped shirts, it

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a branch of literary studies. See, e.g., Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 47-56 (1984). But see Steve Fuller, *Playing Without a Full Deck: Scientific Rationalism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549, 553 (1988); John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 385 (1986).

8. CAPPELLA & JAMIESON, *supra* note 6, at 17-37. Strategic reporting was pioneered by Theodore White in *THE MAKING OF THE PRESIDENT*, 1960 (1961) and *THE MAKING OF THE PRESIDENT*, 1972 (1973).

is increasingly difficult for them to command civil acceptance and obedience to their decisions, much less to their political utterances.

The Court's own statements describing its understanding of courts' roles in government reinforce the widespread perception of the Supreme Court and other high courts as political institutions. Although they incidentally decide cases, Justices sitting on the Supreme Court of the United States have by the terms of their certiorari rule<sup>9</sup> almost completely disowned responsibility for assuring that individuals' legal rights and duties are actually enforced by lower courts in individual cases. They seldom bother to decide a case unless it has impact on some public interest. Moreover, when the Court was deciding only 150 cases a year, it was tolerating widespread undiscipline by lower federal courts;<sup>10</sup> now that it has cut that number almost in half, it is forsaking responsibility for holding lower courts in line. It decides only those cases which provide a suitable occasion for expressing policies the Justices choose to express; in that critical respect, their work is unmistakably, and by any standard, political. While the Court may have been viewed somewhat differently before 1925 when it began to exercise this form of discretion,<sup>11</sup> it is no longer unreasonable to regard the Court less as a

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9. Supreme Court Rule 10 begins: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." SUP. CT. R. 10.

10. PAUL D. CARRINGTON, U.S. COURTS OF APPEALS AND U.S. DISTRICT COURTS: RELATIONSHIPS IN THE FUTURE IN THE FEDERAL APPELLATE JUDICIARY IN THE 21ST CENTURY 70 (Cynthia Harrison & Russell R. Wheeler eds., 1989); Paul D. Carrington, *The Function of the Civil Appeal: A Late Century View*, 38 S.C. L. REV. 411, 416-17 (1987); Peter L. Strauss, *One Hundred Fifty Cases Per Year: Some Implications of the Supreme Court's Limited Resources for Judicial Review of Agency Action*, 87 COLUM. L. REV. 1093, 1095 (1987).

11. Prior to 1925, the Court was obliged to decide the cases brought to it. This reality was a central justification offered by Chief Justice Marshall for the institution of judicial review of legislation in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). The Court gained some control over its docket with the enactment of the Judges' Bill of 1925, ch. 229, 43 Stat. 936 (1926). The United States Courts of Appeal were created by the Evarts Act of 1891, ch. 517, 26 Stat. 826 (codified as amended at 28 U.S.C. § 101 (1994)), and are institutions that have inherited the Supreme Court's responsibility for assuring the lower courts' fidelity to controlling legal texts. FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM* 103-45 (1927). The power of the Court over its docket was made almost complete by the Supreme Court Case Selection Act, Pub. L. No. 100-352, 102 Stat 662 (1988) (codified at 28 U.S.C. § 1254

court of law engaged in law enforcement and more as a political institution openly and primarily engaged in making policy. Most highest state courts exercise discretion in the selection of their cases similar to that enjoyed by the Supreme Court and likewise view themselves as engaged primarily in making rules rather than enforcing them.<sup>12</sup>

Indeed, in recent decades, the idea has been advanced and widely accepted that courts make better law than legislative bodies and ought, therefore, to be less constrained in performing that service.<sup>13</sup> In this view, the absence of political accountability is seen as a justification for judicial action to create law that cannot be enacted by democratic means.

Citizens who do not like the law their unreviewable courts make have reason to protest and resist. In a society promising them the right to self-government, it is an insufficient answer to say that judges and Justices have all our individual interests at heart and speak for the welfare of future generations and that we must, therefore, passively accept anything they say and do. That is, after all, what royalists and feudal lords said. Where there is so much discretion visible in the exercise of the power of government, there must come times when citizens justifiably demand to throw the rascals out, or at least constrain them.

If such options are not even open to political debate, alienation is the inevitable result: citizens less frequently cast votes they deem meaningless. If their impotence is prolonged, they cease to care. As the experience of the ancients has so long told

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(1994)). This evolution has substantial implications for the structure of the lower federal courts. Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 18-24. Among other effects, it has inspired a desire for emulating discretion in the intermediate courts. See, e.g., Judge Robert M. Parker & Ron Chapman, Jr., *Accepting Reality: The Time for Adopting Discretionary Review in the Courts of Appeals Has Arrived*, 50 SMU L. REV. 573, 577 (1997).

12. See, e.g., ALA. R. APP. P. 39(c); ALASKA R. APP. P. 304; ARK. R. S. CT. & CT. APP. 1-2(d), (f); COLO. APP. R. 49; GA. S. CT. R. 29, 30; IDAHO APP. R. 118(b); KAN. STAT. ANN. § 20-3018(b); KY. R. CIV. P. 76.20(1); MINN. R. CRIM. P. 29.04 subd. 4; MINN. R. CIV. P. 117 subd. 2; N.J. R. APP. PRAC. 2:12-4; N.D. S. CT. ADMIN. R. 27, § 13(c); PA. R. APP. P. § 1114 & Note; S.C. APP. CT. R. 226(b); TENN. R. APP. P. 11(a); UTAH R. APP. P. 46; WASH. R. APP. P. 4.2, 13.5(b); WIS. R. APP. P. 809.62(1).

13. Perhaps the best expression of this idea is in Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1313-16 (1976).

us, that is generally a condition leading to disintegration, chaos, despotism, and a dark age. It is for this reason that the right to a role in the conduct of government is the right upon which others rest.

Robert Bork<sup>14</sup> and Orrin Hatch<sup>15</sup> have recently proposed constitutional reforms to make the federal judiciary, and especially the Supreme Court of the United States, less independent and more subject to the restraints of democratic self-government. One need not share the politics of Judge Bork or Senator Hatch, nor support their specific proposals for reform, to agree with them that constitutional reform for that purpose is warranted.<sup>16</sup> If, as we surely do, we need and want judicial independence and the integrity it affords to legal institutions, simple prudence dictates restraints on an unreviewable Court sufficient to assure that it cannot exercise so much political power that it usurps the role of the institutions of self-government, as it has been prone to do for almost two centuries of its existence. Judge Bork and Senator Hatch ought, for that reason, to be taken seriously in their concerns.

## II. THE MORAL DUTY OF HIGHEST COURTS

The issues Judge Bork and Senator Hatch raise are anything but new. The balance between judicial independence and political accountability has been deeply troubling since the founding of the Republic. Those who created the Supreme Court in the eighteenth century knew that it would play an important role in our political life. Its politicization was acknowledged by Alexander Hamilton in *The Federalist*,<sup>17</sup> and challenged by the Antifederalists opposing ratification of the federal Constitu-

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14. ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 96-122 (1996).

15. Senator Orrin Hatch, Remarks Before the Federalist Society's 10th Anniversary Lawyers Convention (Nov. 15, 1996), in *AN INDEPENDENT JUDICIARY*, *supra* note 5, at 23.

16. *See, e.g.*, LOUIS LUSKY, *OUR NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA* 141-51 (1993); FRANK R. STRONG, *JUDICIAL FUNCTION IN CONSTITUTIONAL LIMITATION OF GOVERNMENTAL POWER* 153-69 (1997).

17. *THE FEDERALIST* No. 78, at 464 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

tion.<sup>18</sup> But it may be that neither side to that debate fully understood the secondary consequences of sending a law court on the errand of judicial review.

The complexities of judicial political power were comprehensively revealed a half-century later by Francis Lieber,<sup>19</sup> a sophisticated theorist who well understood the subtleties of interpretation. He affirmed that extravagant interpretation and construction of legal texts in a constitutional republic is a usurpation of the authority and responsibility of legislative bodies and a threat to self-government by the people.<sup>20</sup> When it is a constitution that is extravagantly interpreted, the effect can be to pretermitt debate and political contests on issues of greatest concern to citizens. A secondary effect of that pretermission is to deny citizens the sense of participation and proprietorship of the government needed to connect themselves to their shared enterprise, a connection crucial to their willingness to support and defend it in times of crisis. When policy is made by elected officials, the electorate shares moral responsibility for it. Legislation, like a jury's verdict, diffuses the odium of decision on hotly contested matters. Legislative decisions are also temporary, and invite disappointed contestants to try again later. In these ways,

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18. *E.g.*, THE ANTI-FEDERALIST PAPERS AND THE CONSTITUTIONAL CONVENTION DEBATES 297 (Brutus) (Ralph Ketcham ed., 1986). Brutus accepted the principle of tenure for "good behavior." See also THE ANTIFEDERALISTS 49-51 (Cecelia M. Kenyon ed., 1966) (stating that the judges of the Courts of Congress would not be independent).

19. FRANCIS LIEBER, LEGAL AND POLITICAL HERMENEUTICS, OR PRINCIPLES OF INTERPRETATION AND CONSTRUCTION IN LAW AND POLITICS WITH REMARKS ON PRECEDENTS AND AUTHORITIES (2d ed. 1839). This work originally appeared serially in *The American Jurist* and *Law Magazine*. The articles were published together as a book by Little and Brown in Boston in 1839. A third edition was edited by Professor William G. Hammond of the University of Iowa and published by F.H. Thomas & Co. in St. Louis in 1880. That edition was republished in 1995 in 16 CARDOZO L. REV. 1883. For the background of the third edition, see Paul D. Carrington, *William Gardiner Hammond and the Lieber Revival*, 16 CARDOZO L. REV. 2135, 2135 (1995); MICHAEL H. HOEFELICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 57-58 (1997). Utterances denying the political nature of high judicial office have perhaps always been common, but there may never have been a time when observant lawyers were beguiled by them. See, e.g., JACK W. PELTASON, FEDERAL COURTS IN THE POLITICAL PROCESS 29-42 (1955); VICTOR G. ROSENBLUM, LAW AS A POLITICAL INSTRUMENT 1-11 (1955).

20. Francis Lieber, *Legal and Political Hermeneutics, or Principles of Interpretation and Construction in Law and Politics with Remarks on Precedents and Authorities*, 16 CARDOZO L. REV. 1883, 1918-20, 1939 (1995).



they provide political stability, a condition essential to the protection of civil liberties and to the functioning of markets.

Learned Hand expressed with his accustomed eloquence a sentiment presumed by Lieber, among others, to be widely shared. Acknowledging the "wayward vagaries of popular assemblies" and "how illusory would be the belief that my vote determined anything," Hand nevertheless protested rule by "a bevy of Platonic guardians," affirming that when he went to the polls, he had a "satisfaction in the sense that we are all engaged in a common venture."<sup>21</sup> The right he claimed—to have his views taken into account in the formation and interpretation of the legal texts governing the Republic—is a right at least as basic as the right to an independent judiciary. Not only is it deeply embedded in our state and federal constitutions, but evangelism for that idea has been the theme of our relations with other countries since the eighteenth century, and especially in the last century when we have fought wars to "make the world safe for democracy" and to promote and protect it in scores of countries.<sup>22</sup> An irony of our time is that as we become ever more insistent on self-government elsewhere, our judges are deciding many, perhaps even most, of the political issues about which we most care.

Indeed, with respect to the primary civil liberty, an oligarchic judiciary is not "the least dangerous branch."<sup>23</sup> In the knowledge that this is so, a long line of American theorists, including Hugh Henry Brackenridge,<sup>24</sup> Lieber, Theodore Sedgwick,<sup>25</sup> Thomas Cooley,<sup>26</sup> James Bradley Thayer,<sup>27</sup> John

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21. LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES* 73-74 (1958).

22. In November 1998, our government was actively promoting popular self-government in Malaysia and Iraq. See *THE ECONOMIST*, Nov. 6, 1998, at 2.

23. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 100-02 (Yale Univ. Press 1986) (1962). Bickel's title was taken from *THE FEDERALIST* NO. 78, at 504 (Alexander Hamilton) (Edward Mead Earle ed., 1976).

24. Paul D. Carrington, *Meaning and Professionalism in American Law*, 10 *CONST. COMMENTARY* 297, 302 (1993). A broader summary of Brackenridge's views is presented in Paul D. Carrington, *Law and Chivalry: An Exhortation from the Spirit of the Hon. Hugh Henry Brackenridge of Pittsburgh (1748-1816)*, 53 *U. PITT. L. REV.* 705 (1992).

25. THEODORE SEDGWICK, *A TREATISE ON THE RULES WHICH GOVERN THE INTERPRETATION AND APPLICATION OF STATUTORY AND CONSTITUTIONAL LAW* 404-580 (W.

Chipman Gray,<sup>28</sup> Ernst Freund,<sup>29</sup> Louis Brandeis,<sup>30</sup> Learned Hand,<sup>31</sup> Herbert Wechsler,<sup>32</sup> Alexander Bickel,<sup>33</sup> John Ely,<sup>34</sup> Jessie Choper,<sup>35</sup> Archibald Cox,<sup>36</sup> and many others have counseled self-restraint in the exercise of the courts' political role. They would have Justices eschew fame, the adoration of the media and the academy, and even "greatness" to settle for the modest facelessness of drones. They have sought to nurture a judicial profession whose members are merely predictably, and thus forgettably, *good* at the work of applying common sense to opaque legal texts in diverse and intricate factual circumstances.

The morality fitting the work of highest courts was elegantly stated some years ago by Lon Fuller.<sup>37</sup> Its principles include the duty to interpret law predictably as other lawyers and informed citizens would, and not as agents freely pursuing their own gratification.<sup>38</sup> As Karl Llewellyn was fond of saying, the proper aim of the appellate judge is to make decisions that are

Norton Pomeroy ed., 2d ed. 1874) (1857).

26. THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 38-84 (1868).

27. James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

28. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF LAW 253 (photo. reprint 1972) (R. Gray ed., 2d ed. 1921). The first edition was published in 1909.

29. ERNST FREUND, THE POLICE POWER: PUBLIC POLICY AND CONSTITUTIONAL RIGHTS 17 (1904).

30. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 345-49 (1936) (Brandeis, J., concurring); see PHILIPPA STRUM, *BRANDEIS: BEYOND PROGRESSIVISM* 89 (1993) (discussing Brandeis's belief in judicial restraint).

31. HAND, *supra* note 21, at 51-77; see also GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 121-23, 452-53 (1994) (discussing Hand's belief in judicial restraint).

32. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11-20 (1959).

33. BICKEL, *supra* note 23, at 133-43.

34. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 101-04 (1980).

35. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 60-128 (1980).

36. ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 99-118 (1976).

37. LON L. FULLER, *THE MORALITY OF LAW* (1964); see also CASS R. SUNSTEIN, *LEGAL REASONING AND POLITICAL CONFLICT* (1996) (discussing the influence moral principles have on legal interpretations).

38. FULLER, *supra* note 37, at 81-91.

"reckonable."<sup>39</sup> The primary moral qualification for high court judges is, therefore, not the moral courage required of fact finders, but moral judgment suffused with modesty. As Holmes said of Chief Justice Shaw, the appellate judge ought to possess an "accurate appreciation of the requirements of the community whose officer" he or she is.<sup>40</sup> Or, in Thomas Cooley's phrase, the duty of the judge is to express "the common thoughts of men."<sup>41</sup> This morality applies of course to the interpretation and construction of statutes as well as constitutions,<sup>42</sup> and to the interpretation of judicial precedent.<sup>43</sup> A court that rewrites a statute to suit the political tastes of its members<sup>44</sup> or self-indulgently departs from settled precedent has, as Lieber and Cooley affirmed, violated the public trust.

This morality of judicial self-restraint, it must be acknowledged, is not universally respected. From the first days of the Republic, there were those who disdained democratic politics and who saw the role of the federal judiciary in oligarchic terms. Founder Gouverneur Morris held that the aim of the Constitution and the judiciary was and should be "[t]o save the people from their most dangerous enemy: to save them from themselves."<sup>45</sup> Equally outspoken was Christopher Tiedemann, a nineteenth-century academic champion of social Darwinism, who urged courts to find the political doctrine he favored in the subtext of

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39. KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 216 (1960).

40. OLIVER WENDELL HOLMES, *THE COMMON LAW* 85 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881).

41. HARVARD UNIVERSITY, *A RECORD OF THE COMMEMORATION, NOVEMBER FIFTH TO EIGHTH, 1886, ON THE TWO HUNDRED AND FIFTIETH ANNIVERSARY OF THE FOUNDING OF HARVARD COLLEGE* 95 (John Wilson & Sons Univ. Press 1887); see also HOLMES, *supra* note 40, at 41 (articulating the principle that the law should correspond with the ideals of the general community).

42. See WILLIAM N. ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* 174-204 (1994).

43. See LLEWELLYN, *supra* note 39, at 214-15.

44. A recent example is the rewriting of the Federal Arbitration Act of 1925 in a series of Supreme Court decisions beginning in 1967. Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997). Another is the rewriting of the Sherman Act. HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 48-71 (1994); Philip Areeda, *A Second Century of the Rule of Reason*, 59 ANTITRUST L.J. 143 (1990).

45. 2 ALBERT J. BEVERIDGE, *THE LIFE OF JOHN MARSHALL* 61 (1919) (citation omitted).

the Fourteenth Amendment so that no common legislature could ever deprive the elite of their dessert.<sup>46</sup> Walter Lippman, no lawyer and no Darwinist, but a leading intellectual among twentieth-century progressives, was no less derisive of popular moral judgment; he saw no reason for experts, such as he presumed judges to be, to defer to the will of the unwashed.<sup>47</sup>

More recently, judicial deference to democratic institutions has been a target for two groups of academic theorists. Mark Tushnet is eminent among those who scorn those principles of self-restraint as too indeterminate to warrant respect and who urge judges to impose justice (as they perceive it) on litigants without regard for noisome verbiage in legal texts.<sup>48</sup> Erwin Chemerinsky, a man of similar mind, hopes that the restraints of constitutional morality might be practiced by judges who oppose his politics, but not by those who share them.<sup>49</sup> This cynicism about the worth of modesty and self-restraint in the conduct of high judicial office seems now to have appropriated the label "pragmatism,"<sup>50</sup> but such pragmatism is not to be mistaken for the thoughts of John Dewey or other American philosophers who earlier claimed the same name.<sup>51</sup> It is a political morality that disregards the homely right of citizens to self-government, a right Dewey frequently celebrated.<sup>52</sup>

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46. CHRISTOPHER TIEDEMANN, A TREATISE ON THE LIMITATIONS OF POLICE POWER IN THE UNITED STATES 571 (1886).

47. WALTER LIPPMAN, ESSAYS IN THE PUBLIC PHILOSOPHY 41-42 (1955); WALTER LIPPMAN, THE PHANTOM PUBLIC 173-86 (1925); WALTER LIPPMAN, PUBLIC OPINION 234-52 (1922).

48. E.g., Mark Tushnet, *Constitutional Interpretation, Character, and Experience*, 72 B.U. L. REV. 747 (1992); Mark Tushnet, *Constitutional Interpretation and Judicial Selection: A View from THE FEDERALIST PAPERS*, 61 S. CAL. L. REV. 1669 (1988); Mark Tushnet, *Thayer's Target: Judicial Review or Democracy?* 88 N.W. UNIV. L. REV. 9 (1993).

49. ERWIN CHERMERINSKY, INTERPRETING THE CONSTITUTION 117-18 (1987).

50. J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831, 1851 (1991).

51. For an account of the interaction of Dewey with legal academics, see JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 8-9, 24-25, 57-58, 68-69, 231-32 (1995).

52. E.g., JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1927); see also JOHN DEWEY, DEMOCRACY AND EDUCATION 81-99 (1916) (discussing how democracy arises in an educated society); John Dewey, *The Future of Liberalism or the Democratic Way of Change*, in WHAT IS DEMOCRACY? ITS CONFLICTS, ENDS AND MEANS 3-10 (1939) (discussing the enduring qualities of liberalism).

A second group of theorists professing the transparency of judicial professionalism are adherents of public choice theory, a subset of economists. These theorists see all exercises of official power as self-serving behavior to which moral restraints have no more application than do the teachings of Christ to the law of contracts.<sup>53</sup> For example, Richard Posner, before he became a judge, joined with William Landes in expressing the belief that judicial behavior is properly motivated by the gratification of imposing one's personal preferences and values on society.<sup>54</sup> With experience on the bench, Judge Posner redefined his own commitment to "pragmatism" to embrace a moral duty to decide according to pre-existing texts and traditions,<sup>55</sup> and he favors what he denotes as structural restraint, namely, appropriate deference to the roles of elected officers of government.<sup>56</sup> Yet, the notion that high court judges are morally free to effect any policy they and their political allies may favor continues to underlie the thought of many who want judges to deploy the pitiless principles of market economics as the premise for their policy-making.<sup>57</sup>

The expectation that high court judges will act on the basis of their political prejudices is by no means limited to the academy. It also underlies much journalism, especially the form of journalism seeking political labels for jurists. Its presence is manifested, for example, in the chronic unwillingness of the elite of the journalism profession (along with the legal academy) to

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53. See generally DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991) (discussing public choice theory and some of its implications for the American legal system).

54. See Richard A. Posner & William M. Landes, *The Independent Judiciary in the Interest-Group Perspective*, 18 J.L. & ECON. 875, 887 (1975); Richard A. Posner & William M. Landes, *Legal Precedent: A Theoretical and Empirical Analysis*, 19 J.L. & ECON. 249, 272 (1976). More recently, after a decade on the bench, Judge Posner has supposed that "trying to change the world" is not a judicial aim. Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everyone Else Does)*, 3 SUP. CT. ECON. REV. 1, 2 (1993). The change in his views was noted and discussed by Ronald A. Cass, *Judging: Norms and Incentives of Retrospective Decision-Making*, 75 B.U. L. REV. 941, 982-84 (1995).

55. RICHARD POSNER, *OVERCOMING LAW* 389-405 (1995).

56. RICHARD POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 318-19 (1996).

57. E.g., RICHARD A. EPSTEIN, *PRINCIPLES FOR A FREE SOCIETY: RECONCILING INDIVIDUAL LIBERTY WITH THE COMMON GOOD* (1998); BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

accept Justice Byron White for the non-ideological jurist that he was. White rejected the role of Platonic Guardian and restrained the urge he must have felt to impose his politics on his fellow citizens or on those whom they had elected to make political decisions. His behavior in this respect was seemingly incredible to the *Washington Post* or the *New York Times*, who flailed him from time to time for what they classified as his lack of an ideological purpose.<sup>58</sup> It seems that judges who pursue no aims of their own make poor copy.

There are at least three miscalculations embodied in the preference of those desiring judges to undertake the role denoted by Hand as that of Platonic Guardians, that is, judges who know best what laws the Republic requires. First, it is the destiny of a republican judiciary that disregards the "common thoughts of men" to be resisted by those whom it disdains; judgments of high courts purporting to effect grand changes in the social order, therefore, are generally useless and sometimes worse than that. Unfortunately for judges imbued by ambition, people do not change their beliefs, or even much of their conduct, because of anything that senior citizens in judicial robes may say or do. "Activist," broadly consequential judicial decrees are therefore likely to magnify rather than resolve consequential political and moral conflict.

Second, Justices as a class are not selected for their political wisdom, nor is there reason or experience to suggest that they acquire it in office. Wayward as "the vagaries of popular assemblies" may be, judges of all political persuasions are capable of equally colossal political blunders.<sup>59</sup> In addition to inherent limits to their wisdom, the political vision of Justices is confined by the process by which they make decisions.<sup>60</sup> Because their masks as courts of law require it, they are locked into an adversary process that, despite the mitigating effect of the certiorari process, limits their choice of timing their decisions and also limits the factual information or experience available to them at

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58. On White's career-long disconnection with those striving to put a partisan political spin on his decisions, see DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* 379-80, 412-13, 440-41, 454-55 (1998).

59. HAND, *supra* note 21, at 73.

60. *E.g.*, DONALD L. HOROWITZ, *COURTS AND SOCIAL POLICY* (1977).

the time they must decide. That cases must be decided also impedes the judiciary's opportunity to broker prudent compromises between competing values and its opportunity to correct its mistakes. Political blunders by the judiciary are, for these reasons, both more likely and more costly.<sup>61</sup>

Third, courts assuming the role of third chamber to bicameral legislatures invite political attack threatening their own independence, thereby diminishing their competence for the more humdrum, but more essential, work of enforcing legal rights and duties. When high courts displace legislatures as cockpits for partisan struggle, there is no organ remaining that is qualified by disinterest to decide "cases and controversies" involving politically sensitive matters by applying law to fact. For all these reasons, Justices who are "pragmatists" in the contemporary, permissive sense threaten the political stability of the Republic and thereby indirectly threaten our civil liberties, civil rights, and market capitalism, all of which depend on the political stability the Republic affords.

### III. MORTAL FAILINGS OF JUSTICES

Most Justices of the Supreme Court, for the reasons stated, have acknowledged the wisdom of deference to the political branches of government. Very few if any would openly acknowledge themselves to be "pragmatists" in the extravagant, contemporary sense, or credit the insight of public choice theorists as applied to themselves. Yet the morality of appellate work has never been diligently observed in the Supreme Court of the United States. We can be sure that chronic judicial usurpation of political power is seldom a conscious, artful act.

One impediment to the exercise of sound, deferential judgment may be the ambition to be known and even immortalized as a great Justice, an ambition that we extol in other walks of public life. Especially in the age of the media and celebrities, the effect of greatness as a judge is not achieved by humdrum, conventional interpretations of legal texts.<sup>62</sup> In addition, the temp-

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61. *But see*, Chayes, *supra* note 13, at 1307-08 (explaining that judges are likely to have some experience with politics and public policy problems given the operation of federal appointive power and the demands of contemporary law practice).

62. On the lionization of the Warren Court, see LAURA KALMAN, *THE STRANGE*

tation must persist, and seems perhaps to grow over years of judicial service, to make one's life work count for something noticeable.

A second human frailty pervasive among high court judges is the temptation to rationalize their desires and fears. Given the nature of their work, it would be surprising if high court judges were not especially adept at rationalization, and thus especially vulnerable to its temptations.<sup>63</sup> As Judge Richard Posner has remarked, "[i]t is easy [for a judge] to confuse one's strong policy preferences with the law."<sup>64</sup> Political theorists who stop short of embracing the stringent premise of public choice theory have supplied a professional jargon for the observation that judges tend to detect their own ideological premises in legal texts,<sup>65</sup> and have even quantified this effect in the work of the judges of the United States Courts of Appeal.<sup>66</sup> Justices who are weak in resisting this temptation (and many have been) have produced what has been usefully described as an *insatiable Constitution*, one that judicializes a wide spectrum of political issues.<sup>67</sup>

The observation that Justices are afflicted with these human failings is hardly news. Judges who, because of those inevitable failings, practice "judicial pragmatism" merely validate the mistrust shared for over two centuries by antifederalists, Jacksonians, Populists, and even many Progressives who

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CAREER OF LEGAL LIBERALISM 42-59 (1996); HOROWITZ, *supra* note 60, at 171-219; Morton Horowitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5 (1993). Richard Posner emphasizes literary flair as the factor distinguishing "great judges." See RICHARD A. POSNER, CARDOZO: A STUDY OF REPUTATION 138-40 (1990); RICHARD A. POSNER, THE LEARNED HAND BIOGRAPHY; Richard A. Posner, *The Question of Judicial Greatness*, 104 YALE L.J. 511, 522-23 (1994); see also ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 30 n.30 (1958) (listing the ten greatest jurists in American history).

63. FRANK M. COFFIN, THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH 241-45 (1980).

64. POSNER, *supra* note 55, at 402.

65. E.g., Jenna Bednar & William N. Eskridge, Jr., *Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism*, 68 S. CAL. L. REV. 1447, 1491 (1995).

66. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 YALE L.J. 2155, 2168-73 (1998).

67. Anthony J. Sebok, *The Insatiable Constitution*, 70 S. CAL. L. REV. 417 (1997).



through the course of our history have questioned the prudence of relying too much on the self-discipline of judges. Most Americans of these diverse persuasions have favored qualifying the independence of high court judges with some means of political accountability in order to protect the right of citizens to govern themselves.<sup>68</sup> Among their number have been Presidents Jefferson, Jackson, Lincoln, Theodore, and Franklin Roosevelt. I write in that tradition.

Their insight has been widely shared. John Stuart Mill forcefully expressed it when he observed that:

The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.<sup>69</sup>

In short, people with power, even (or perhaps especially) Justices, often have difficulty distinguishing between doing good and requiring others to do good. They are chronic intruders on other people's right to make what may, or may not, be mistakes of political judgment.

Most draftsmen of constitutions for republics have recognized these normal human failings and have sought to constrain them. Not only have there been scores of state constitutions ratified in America since 1840 when Jacksonian-populist politics gained ascendancy,<sup>70</sup> but there have also been perhaps as many as two hundred constitutions written in foreign countries in that time.<sup>71</sup> Judges empowered to enforce these constitutions have never, anywhere, been afforded the feudal security of life tenure that is enjoyed by the Justices of the Supreme Court of the Unit-

68. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345, 348; Glenn R. Winters, *Selection of Judges—An Historical Introduction*, 44 TEX. L. REV. 1081, 1084 (1966).

69. JOHN STUART MILL, ON LIBERTY 28 (1885), quoted in *Furman v. Georgia*, 408 U.S. 238, 467 (1971) (Rehnquist, J., dissenting).

70. For current provisions, see 34 THE COUNCIL OF STATE GOVERNMENTS, THE BOOK OF THE STATES 127-28 (1996).

71. An updated compilation is CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert H. Flantz ed., 1998).

ed States. For courts interpreting written constitutions promulgated since 1840, the high court of American Samoa may be the only one enjoying the terms of employment conferred on the Supreme Court of the United States. Thirty-nine of the fifty states presently provide a measure of political accountability for judges through some form of election, and every modern constitution not providing for elections, imposes term and/or age limits. Term and/or age limits are universal in foreign constitutions. An additional form of constraint has been to ease the process for constitutional amendment. Most state and foreign constitutions are readily amended when those who interpret them exceed their responsibilities. The politically important German constitution, for example, can be amended by a bicameral parliamentary supermajority.<sup>72</sup>

If they were fresh questions today, there would be few if any advocates for life tenure for Supreme Court Justices, and it is unlikely that the Constitution would be so difficult to amend.<sup>73</sup> But it is very difficult to amend, not least because many Americans, without regard for their political persuasion, revere it beyond reason.<sup>74</sup> One need not agree with Jefferson that the Constitution should have a short sunset provision<sup>75</sup> to share Francis Lieber's view that the instrument should be freely amended to correct its manifest deficiencies.<sup>76</sup> It is not politically irresponsible to change the Constitution when it is producing harmful results. Extreme reverence for an institution staffed by mortal beings is misplaced sentimentality. Correction of the

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72. GG Art. 79. See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 30-32, 171 (1994).

73. DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION 1776-1995*, at 461-87 (1996); *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* (Sanford Levinson ed., 1995); Erwin Chemerinsky, *Amending the Constitution*, 96 MICH. L. REV. 1561, 1568 (1998).

74. Henry Monaghan, *Our Perfect Constitution*, 56 N.Y.U. L. REV. 353 (1981).

75. Letter from Thomas Jefferson to James Madison (Sept. 6, 1789), in 15 *THE PAPERS OF THOMAS JEFFERSON* 392 (Julian P. Boyd ed., 1958). For an extraordinary collection of Jefferson's views on this question, see *JEFFERSON ON POLITICS AND GOVERNMENT*, available in <http://text.virginia.edu/jefferson/quotations>. In letters to James Madison in 1789 and Samuel Kercheval in 1816, Jefferson argued for a new constitutional convention every nineteen years.

76. FRANCIS LIEBER, *AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES SUBMITTED TO THE CONSIDERATION OF THE AMERICAN PEOPLE* (New York, Loyal Pub. Co. 1865).

excessive independence of the Supreme Court to restore vitality to state and local politics is therefore overdue.<sup>77</sup>

#### IV. THE CONTEMPORARY POLITICS OF COURT REFORM

A somewhat ironic aspect of the present dissatisfaction with the Supreme Court is that it is expressed by politicians who otherwise profess to be conservatives favoring good order and the protection of property, social conditions generally associated with trust in the law and its institutions. They appear to share little common political ground with academics such as Tushnet or Chemerinsky, although they may share some ideas with Tiedeman. Among the very dissatisfied are Pat Buchanan,<sup>78</sup> Robert Bork,<sup>79</sup> Edwin Meese,<sup>80</sup> and Orrin Hatch.<sup>81</sup>

Judge Posner aptly observes that "structural" judicial restraint (as he denotes it), is a habit of thought or professional practice having no ideology to which a political label can be attached. Whether it favors a particular group or set of interests depends on whether judges at a given moment in time are more sympathetic with those interests than are the legislators or city aldermen.<sup>82</sup> Senator Hatch likewise observes that the issue he raises is larger than partisan ideology.<sup>83</sup> His aim, and that of Judge Bork, to restrain the political overreaching of federal courts, if not their specific proposals, ought to attract the support of persons across a wide political spectrum who, with Hand, prefer democratic self-government despite its many hazards and shortcomings to the arrogance of Platonic Guardians of whatever political stripe. Just as "conservatives" have a large stake in the

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77. But see Suzanna Sherry, *Judicial Independence: Playing Politics with the Constitution*, 14 GA. ST. U. L. REV. 795 (1998).

78. Pat Buchanan, *Better to Shear Shannon—Or the Judges?*, DETROIT NEWS, Aug. 18, 1994, at A11; see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law* 62 U. CHI. L. REV. 689, 696 n.22 (1995).

79. BORK, *supra* note 14.

80. Edwin Meese III & Rhett DeHart, *Reining in the Federal Judiciary*, 80 JUDICATURE 178 (1997).

81. Hatch, *supra* note 15. For a recent review of some other alternatives, all of them by my interpretation very bad, see MAX BOOT, OUT OF ORDER: ARROGANCE, CORRUPTION AND INCOMPETENCE ON THE BENCH 198-218 (1998).

82. POSNER, *supra* note 56, at 318.

83. Hatch, *supra* note 15.

integrity, and thus the independence, of the judiciary, so do "liberals" have good reason to fear the misuse of political power by high courts. One need not share their politics to recognize the imprudence of deploying judicial power to effect social change that most people will resist, or to restrain social change that will be effected whatever judges may say in opposition to it.

Yet, many self-described "liberals" such as Tushnet and Chemerinsky seem to believe that the right to an independent judiciary entails a right of access to judges willing to act as Platonic Guardians.<sup>84</sup> A possible explanation of such thinking may be found in the posthumous work of Christopher Lasch calling our attention to what he denotes "The Revolt of the Elite."<sup>85</sup> According to Lasch, there is a revolt by many in the academy and the media, and perhaps by some judges, against the moral values of those who vote, pay taxes, bear and raise the Republic's children, and put their lives at risk in its defense.<sup>86</sup> The best available means of avoiding the noisome duty of convincing a *lumpenproletariat* majority that the elite hold a correct world view has been to constitutionalize any political issue that might be of interest so that it can be decided by judges who can expect to seek their applause and the immortality conferred by the elite of a future generation on exponents of what is then perceived as political wisdom.<sup>87</sup>

A deeper but not unrelated explanation may be found in the work of Michael Sandel, who explains that the American tradition of sharing power has been displaced in the last half-century by a vision of "freedom" enlarging individual autonomy and governmental neutrality at the expense of the bonds uniting us in a common venture.<sup>88</sup> Evidence to support this hypothesis can be found in abundance in jurisprudential scholarship that omits reference to even the possibility that judges ought or could be influenced in the formulation of doctrine by "the common

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91. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 141, 223-46 (1995).

92. Such class arrogance may not be limited to the American judiciary. Robert Bork reports his detection of similar sentiments among members of the European Court. BORK, *supra* note 14, at 83-119.

93. Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399 (1998); Robert C. Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 430, 442 (1998).

94. See, e.g., William J. Brennan Jr., *The Equality Principle: A Foundation of American Law*, 20 U. CAL. DAVIS L. REV. 673 (1987).

thoughts of men.”<sup>89</sup> Rare among academics is a regard for, and a willingness to actively participate in, democratic politics.<sup>90</sup> In such an environment, it would be surprising if judges were not themselves increasingly indifferent to the moral and political judgment of those they govern and indifferent to the prerogatives and authority of those elected to make policy.

Sandel’s observation, if accurate, may reflect a larger phenomenon called to our attention by yet another distinguished historian, Robert Wiebe. Wiebe observes that since World War II, there has been a ruling class in America whom he denotes, perhaps euphemistically, as “the national class.”<sup>91</sup> This class views itself as a meritocracy that has led the nation to political and economic domination of the world. It would be reasonable for judges among such a class to suppose that, like other highly trained experts, such as economic advisors who prevent depressions by adjusting interest rates, they have the right answers to moral questions of political consequence, and are entitled to think of democratic politics as a mere impediment to be overcome.<sup>92</sup>

Perhaps the leading twentieth-century practitioner of constitutional law-making in disregard of the rights of citizens to participate in democratic government was William Brennan. As Frank Michelman sympathetically describes him, he was a model activist judge.<sup>93</sup> At the time of his appointment as the only Catholic member of the Court, some anti-Catholics likely wondered if he might be subject to papal authority in his interpretations of the Constitution of the United States. In a way, such concern was validated by his career, for the inflated sense of the

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89. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Edward Rubin & Malcolm Feeley, *Creating Legal Doctrine*, 69 S. CAL. L. REV. 1989 (1996).

90. E.g., RICHARD D. PARKER, “HERE THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO (1994).

91. ROBERT H. WIEBE, *SELF-RULE: A CULTURAL HISTORY OF AMERICAN DEMOCRACY* 141, 223-46 (1995).

92. Such class arrogance may not be limited to the American judiciary. Robert Bork reports his detection of similar sentiments among members of the European Court. BORK, *supra* note 14, at 83-119.

93. Frank I. Michelman, *Brennan and Democracy*, 86 CAL. L. REV. 399 (1998); Robert C. Post, *Democracy, Popular Sovereignty, and Judicial Review*, 86 CAL. L. REV. 430, 442 (1998).

Court's role he brought to its work<sup>94</sup> helped to make the Court resemble a College of Cardinals presuming its own infallibility and telling members of the faith what to believe and how to live. The Brennan encyclicals were liberal in the sense that they *required* the community to respect individual rights, but non-liberal in leaving very little discretion to local congregations to believe, or to act upon the belief, that somewhat less individualism and more community might be preferable. In the belief that the Court had not gone far enough to displace state legislatures and city councils in such matters, Justice Brennan urged state supreme courts to take up any remaining slack.<sup>95</sup> In this, Justice Brennan's "liberal" world view coincided with that of libertarian "conservatives," who generally shared his disdain for the institutions of self-government.

It is an instructive comparison that the traditional Left in England insisted that judges be excluded from political decisions and regarded as mechanics applying legal doctrine in a purely formal style.<sup>96</sup> To assure this result, they argued that judges should be chosen not by a political Lord Chancellor, but by the technocratic English legal profession itself.<sup>97</sup> This view seems to have changed during the 1980s, when English courts became politically more active and the class bias of the profession more evident.<sup>98</sup> Thus, Lord Woolf has lately adjured English courts "to vary the extent of their intervention [in public issues] to reflect current needs . . . [to] maintain the delicate balance of a democratic society."<sup>99</sup> There is now serious concern in England regarding judicial independence and the issues considered in this Article are the subject of heated debate there.<sup>100</sup>

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94. See, e.g., William J. Brennan Jr., *The Equality Principle: A Foundation of American Law*, 20 U. CAL. DAVIS L. REV. 673 (1987).

95. William J. Brennan Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550-53 (1986).

96. ROBERT STEVENS, *THE INDEPENDENCE OF THE JUDICIARY: THE VIEW FROM THE LORD CHANCELLOR'S OFFICE* 179 (1993).

97. T.C. HARTLEY & J.A.G. GRIFFITH, *GOVERNMENT AND LAW* 180 (2d ed. 1980).

98. J.A.G. GRIFFITH, *THE POLITICS OF THE JUDICIARY* 281-344 (5th ed. 1997).

99. *Id.* at 100.

100. *Id.* at 331-33; STEVENS, *supra* note 96, at 177-84.

## V. THE CHRONIC NATURE OF THE COURT'S FAILINGS

The history of the Supreme Court of the United States confirms that there can be and indeed has been too much independence,<sup>101</sup> and that the harms caused by unrestrained Justices have been felt more frequently by those seeking to employ government to correct social and economic ills than by those whose property needs protection. This section is a brief account presented merely to confirm the point that unrestrained judicial independence is not always a principle serving to redeem the status of down-trodden citizens, but is often a threat to all legitimate political interests served by the elected officers of the Republic. Because my purpose here is to dispel undue reverence for the Court, this account will read as a litany of criticism unbalanced by any recognition of the Court's worthy achievements. I do not aim to convince the reader that the Court was a bad idea, but only that it has been a chronic threat to the legitimate, politically stabilizing practice of self-government, especially at the levels of state and local government.

While those now desiring greater control over the judiciary are troubled by the Court's "liberal" conduct in the post-court-packing era,<sup>102</sup> judicial usurpation of the rights and powers of the electorate has been with us since the founding. For most of the time since the founding, the misuses of the Court's powers advanced monied interests against the interests of the less prosperous majority. It has often protected the disadvantaged, but generally when that has been done, there has been no question about the legitimacy of its decisions. Only in the six decades since the Court-packing imbroglio of 1937 has the Court sometimes overborne its role to enlarge the rights of *disadvantaged* individuals or minorities against those of the more secure majority.<sup>103</sup> During that time, the Court has sometimes demonstrated the evenness of its temper by stretching legal texts to ad-

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101. The classic statement of this observation, if sometimes overborne, is in RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 1-19 (1977); see also POSNER, *supra* note 55, at 325-26.

102. Robert Bork, however, has taken note of antecedent judicial usurpations. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 129-32 (1990).

103. See *infra* Part V.F.

vance monied interests.

Thus, the reverence presently expressed by persons of humane or "liberal" instincts for the Supreme Court of the United States as a political institution is misplaced. The Court's chronic class bias can be of no surprise because the institution is constructed with almost no accountability either to the democratic majority or to higher legal authority, as it would be if it were a mere law court enforcing enacted but democratically amendable texts and familiar traditions in accordance with sovereign aims. It was designed to be "counter-majoritarian" or, more accurately, anti-democratic, and so it is. There was the mitigating factor until the last half-century that American lawyers, and hence the Justices, were much more a part of the general fabric of the culture. The elevation of academic standards in this century has produced a judiciary that is increasingly isolated on the hilltop of class pretense.<sup>104</sup> That isolation seems almost certain to continue because of other factors, such as the world economy, that are deepening class lines.

#### A. *The Standard of Good Behavior*

Judicial independence was not a major issue in the debates at the Constitutional Convention at Philadelphia. It was assumed with scant discussion that any judges would be appointed for the period of their "good behavior."<sup>105</sup> The term "good behavior" was derived from an Act of Parliament in 1700 conferring effective life tenure on judges in the royal courts.<sup>106</sup> That the "good behavior" standard allowed judges to remain in office for an exceedingly long time was apparently not seen as a problem in the eighteenth century; it was surely pertinent that the life expectancy of male children was then about thirty-five years and that very few persons attained the age of sixty years. It was unlikely that a man appointed to the bench at fifty would serve

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104. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1890S* 23-25 (1983).

105. GERHARD CASPER, *SEPARATING POWER: ESSAYS ON THE FOUNDING PERIOD* 138 (1997).

106. Settlement Act of 1701, 12 & 13 Will. 2, c. 2, §3 (1700) (Eng.). See Charles Gardner Geyh, *The Origins and History of Federal Judicial Independence*, in *AN INDEPENDENT JUDICIARY*, *supra* note 5, app. at 67.



much more than a decade.

Prior to 1700, most judges on the royal courts had been subject to removal by order of the crown. There was a suggestion made at Philadelphia that judges should be subject to removal by the legislative branch, as English judges were, but the proposal was soundly defeated, Madison arguing that this would expose judges to intimidation by legislators.<sup>107</sup> Bad behavior, it was apparently agreed, would have to be established by proof presented to the Senate by the House.<sup>108</sup>

In thus adopting the English model, those at Philadelphia apparently neglected consideration of substantial differences in the American context. The royal judges on whom employment security was conferred by the Act of Settlement were members of a small, socially elite profession of modest technical competence.<sup>109</sup> Although they were much involved in politics as advisors to the Crown and to Parliament,<sup>110</sup> it was not imagined in England in 1700 that such a group would exercise the political role conferred by written constitutions on American judges.

Most British judges left the colonies during the War, but they were replaced by persons of even more dubious professional competence. Some of the replacements were appointed by governors and some elected by legislators.<sup>111</sup> Vermont became, in 1777, the first state to elect judges by popular vote.<sup>112</sup> Most early American judges enjoyed the same terms of employment as their English predecessors.<sup>113</sup> When the proposed Constitution authorized Congress to create "inferior" federal courts, misgivings were rampant; antifederalists imagined that the federal judges would have class biases similar to the departed and unregretted royalists. It was protested that those at

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107. The motion was made by John Dickinson and was supported only by Connecticut. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428-29 (Max Farrand ed., rev. ed. 1966). For a fuller defense of life tenure, see THE FEDERALIST NO. 78 (Alexander Hamilton).

108. See CASPER, *supra* note 105, at 138.

109. JOHN PHILLIP DAWSON, ORACLES OF THE LAW 12 (1968).

110. STEVENS, *supra* note 96, at 3-4.

111. CASPER, *supra* note 105, at 136 (citing a statement by Rep. Randolph, *available in* 15 ANNALS OF CONGRESS 561 (1806)).

112. EVAN HAYNES, THE SELECTION AND TENURE OF JUDGES 99 (1944).

113. HAYNES, *supra* note 112, at 98-99; Winters, *supra* note 68, at 1082-83.

Philadelphia had made judges independent in the fullest sense of the word:

There is no power above them, to controul any of their decisions. There is no authority that can remove them, and they cannot be controuled by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven.<sup>114</sup>

To correct this alleged excess of power, the amendment to the Constitution most ardently demanded by antifederalists at the time of ratification was the right to jury trial in civil cases.<sup>115</sup> Its purpose was to constrain the federal judiciary.<sup>116</sup>

Article V of the Constitution providing for its amendment was likewise a provision attracting relatively little interest in Philadelphia.<sup>117</sup> There being no experience with such a process, it was unlikely that many would challenge the provision as too much an obstruction of change. At the time, few envisioned that the instrument would survive for centuries. Its provisions, with rare exceptions, limited the federal government, but not the states, and it was apparently widely assumed that any state grievously dissatisfied with the Union would secede.<sup>118</sup> Moreover, the limitations imposed on the federal government were presumed to be those explicitly enumerated in the text; no one in the eighteenth century supposed that judges tenured for life would presume to impose on the federal government their conceptions of natural law.<sup>119</sup> Had anyone envisioned that the

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114. 2 THE COMPLETE ANTIFEDERALIST 438 (Herbert J. Storing ed., 1981) (quoting *Essays of Brutus*, N.Y. JOURNAL, Mar. 20, 1788). For a response, see THE FEDERALIST NO. 78 (Alexander Hamilton).

115. Edith Guild Henderson, *The Background of the Seventh Amendment*, 80 HARV. L. REV. 289, 294 (1966); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 668-69 (1973); see CASPER, *supra* note 105, at 144-45 (quoting portions of *Essays by a Farmer*, MARYLAND GAZETTE (Mar. 21, 1788), in 5 THE COMPLETE ANTI-FEDERALIST 38-39).

116. Wolfram, *supra* note 115, at 657, 662-73.

117. 2 1787: DRAFTING THE U.S. CONSTITUTION 1428-38 (Wilbourn E. Benton ed., 1986).

118. The Articles of Confederation of 1776 contained a provision of indissolubility that was not included in the Constitution of 1787. For an argument that the Constitution can be amended by majority vote of the people, see AKHIL REED AMAR & ALAN HIRSCH, *FOR THE PEOPLE: WHAT THE CONSTITUTION REALLY SAYS ABOUT YOUR RIGHTS* (1998).

119. STRONG, *supra* note 16, at 12-22.

Court would claim the role it has claimed by extravagant interpretation of the Fourteenth Amendment, it is certain that Article V would have taken a very different form.

### *B. The Excesses of Early Federalists*

The behavior of Federalist judges appointed by Presidents Washington and Adams did little to disarm their antifederalist critics. Some Federalist judges deployed their powers to impede the political advent of Jefferson, especially in their administration of the Alien and Sedition Acts of 1798.<sup>120</sup> Justice Samuel Chase, for example, refused to seat any but Federalists as jurors in sedition cases tried in his circuit.<sup>121</sup> When Jeffersonians came to power in 1801, they hoped to even the score with Chase and his like, whom they deemed "partial, vindictive, and cruel."<sup>122</sup> Also on their political agenda was the removal of the Chief Justice John Marshall and other last-minute, "midnight," appointments by President Adams.<sup>123</sup> Their first step was to withhold commissions from some of the other judges appointed at midnight by President Adams, an action leading to the celebrated case of *Marbury v. Madison*.<sup>124</sup> However, the Senate

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120. For an account of this episode, see JAMES MORTON SMITH, *FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES* (1956). The background leading up to this period is described in LEONARD WILLIAMS LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* (1960).

121. Chase announced that "he would teach the lawyers in Virginia the difference between the liberty and the licentiousness of the press' and that he had told the marshal 'not to put any of those creatures called democrats on the jury.'" FRANCIS WHARTON, *STATE TRIALS OF THE UNITED STATES DURING THE ADMINISTRATIONS OF WASHINGTON AND ADAMS* 718 (Philadelphia, Carey & Hart, 1849), quoted in Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 *TUL. L. REV.* 611, 626 (1987).

122. 1 CHARLES WARREN, *THE SUPREME COURT IN U.S. HISTORY 1789-1835*, at 191 (rev. ed. 1926). See generally *id.* at 187-230 (describing the tension between the Federalists and the Antifederalists in appointing and structuring the judiciary). For a recent defense of Chase, see Stewart Jay, *The Rehabilitation of Samuel Chase*, 41 *BUFF. L. REV.* 273 (1993).

123. RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* 33 (1971); JEAN EDWARD SMITH, *JOHN MARSHALL: DEFINER OF A NATION* 301, 372 (1996).

124. 5 U.S. (1 Cranch) 137 (1803).

could not muster the votes to convict Chase.<sup>125</sup> President Jefferson concluded that the impeachment process was a "mere scarecrow,"<sup>126</sup> and the scheme to cleanse the federal judiciary of Federalists was aborted.

Marshall's first act as Chief Justice was to introduce the opinion of the Court to replace the *seriatim* opinions of individual judges theretofore known to English practice.<sup>127</sup> This device greatly enlarged the political role of the Court, for it enabled it to utter legal texts of its own, something no English law court had previously done. In 1810, after leaving the presidency, Jefferson wrote that "[w]e have long enough suffered under the base prostitution of law to party passions in one judge."<sup>128</sup> "In [Marshall's] hands," Jefferson said, "the law is nothing more than an ambiguous text, to be explained by his sophistry into any meaning which may subserve his personal malice."<sup>129</sup> He proposed term limits for federal judges.<sup>130</sup>

*McCulloch v. Maryland*,<sup>131</sup> decided in 1819, aroused Marshall's critics more than any other decision in which he participated. Maryland, it will be recalled, had sued a cashier of the Baltimore branch of the Bank of the United States to collect a tax imposed by its legislature on all banks doing business in the state.<sup>132</sup> The Bank resisted the tax on the ground that, as a federal instrumentality, it was immune to state taxation.<sup>133</sup> Marshall, for a unanimous Court, published a thirty-seven-page opinion not only confirming the position of the Bank, but also laying a political foundation for the relationship between the nation and the states by reading the Necessary and Proper

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125. An account is found in 2 BEVERIDGE, *supra* note 45, at 168-220.

126. 1 WARREN, *supra* note 122, at 295.

127. Paul D. Carrington, *Butterfly Effects: The Possibilities of Law Teaching in a Democracy*, 41 DUKE L.J. 741, 753-54 (1992). The idea was likely derived from the practice of the Privy Council, the political organ advising the Crown on the management of the colonies. F.W. MAITLAND, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 462-63 (1908).

128. Letter to Governor John Tyler (May 26, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 392 (Albert E. Bergh ed., 1904).

129. *Id.*

130. DONALD O. DEWEY, *MARSHALL AND JEFFERSON: THE POLITICAL BACKGROUND OF MARBURY V. MADISON* 170-74 (1970).

131. 17 U.S. (4 Wheat.) 316 (1819).

132. *McCulloch*, 17 U.S. at 318-19.

133. *Id.* at 326.

Clause expansively and by declaring the Constitution to be an instrument created by the People and not by the governments of the states who had initiated the process producing it.<sup>134</sup>

Marshall's politics proved to be sound, at least to those of us who value the cohesion of the federal union. The relations of the states to the Constitution expressed in his opinion of the Court was the one later invoked by Daniel Webster,<sup>135</sup> President Jackson,<sup>136</sup> and Joseph Story<sup>137</sup> in the nullification controversy with South Carolina,<sup>138</sup> and underlay the nationalist argument advanced by Lincoln<sup>139</sup> in his debates with Senator Douglas.<sup>140</sup>

*McCulloch* was, however, a troubling case for those claiming the right of self-government. Conflict between the policy of Maryland and the power of the federal government was unnecessary. The Court could have sustained both the Bank and the Maryland tax, leaving the state's taxing power to be resolved when and if Congress explicitly provided that the Bank should be immune to state taxation. The expansive opinion of the Court's denying Maryland's power to tax a commercial enterprise because it held a federal charter needlessly trespassed on the political rights of the citizens of Maryland to tax and regulate banks.

Criticism of *McCulloch* was stringent. Marshall responded in a journalistic exchange with his Richmond neighbor, Spencer Roane,<sup>141</sup> an ardent Jeffersonian. Even more incensed at Mar-

134. *Id.* at 324-25, 326-27, 377-76.

135. Daniel Webster, Second Reply to Hayne, in 5 THE WRITINGS AND SPEECHES OF DANIEL WEBSTER 248 (James W. McIntyre ed., 1903).

136. Andrew Jackson, Second Inaugural Address, in SPEECHES OF THE AMERICAN PRESIDENTS 93-95 (James Podell & Steven Anzovin eds., 1988).

137. 2 JOSEPH STORY'S COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 543-55 (Da Capo Press 1970) (1833); see also H. Jefferson Powell, *Joseph Story's Commentaries on the Constitution: A Belated Review*, 94 YALE L.J. 1285, 1293 (1985) (explaining that Story's commentaries must be read within the context of President Jackson's nationalistic response to nullification).

138. See generally WILLIAM H. FREEHLING, PRELUDE TO CIVIL WAR: THE NULLIFICATION CONTROVERSY IN SOUTH CAROLINA 1816-1836 (1966) (discussing the nullification crisis in which South Carolina refused to pay a federal tariff and threatened to leave the Union because it believed the tariff was unconstitutional).

139. CREATED EQUAL? THE COMPLETE LINCOLN-DOUGLAS DEBATES OF 1858, at 119-21 (Paul M. Angle ed., 1958).

140. The Douglas position is examined in ROBERT W. JOHANNSEN, THE FRONTIER, THE UNION, AND STEPHEN A. DOUGLAS 96-98 (1989).

141. JOHN MARSHALL'S DEFENSE OF *MCCULLOCH V. MARYLAND* 155-214 (Gerald

shall than Jefferson or Roane was John Taylor, who can be said to be the Founding Father of Critical Legal Studies. In 1820, he published *Construction Construed and Constitutions Vindicated*, a work portraying Marshall and his brethren as an arrogant, overbearing lot of elitists who had abused the political power of the federal judiciary by promiscuous interpretation of the Constitution.<sup>142</sup> Unknown to Marshall's critics was a fact Marshall took pains to conceal: he had a substantial personal financial investment in the Bank that was enhanced by his Court's decision.<sup>143</sup> In due course, Marshall's overreaching was self-defeating, for his opinion set the stage for President Jackson's assault on the Bank which led to its demise.

In the same year in which *McCulloch* was decided, the Court also decided *Trustees of Dartmouth College v. Woodward*.<sup>144</sup> Article I of the Constitution forbade states from making laws "impairing the Obligation of Contracts."<sup>145</sup> The language was an adaptation of a clause in the Northwest Ordinance of 1787, and Madison explained it as a restraint on the practice of making depreciated paper legal tender for the payment of debts.<sup>146</sup>

In *Dartmouth College*, the Court applied this provision to bar New Hampshire from revoking the corporate charter of the college.<sup>147</sup> This required an impressive stretch of the constitutional text. The charter had been issued by the British Crown. Because donors had made gifts to the college in reliance on its charter, Marshall was able to find a contractual duty of New Hampshire to perpetuate the institution in accordance with its original charter on which the donors had relied.<sup>148</sup> And in dicta he went further, stating that "[t]he object for which a corporation is created are universally such as the government wishes to

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Gunther ed., 1969).

142. JOHN TAYLOR, *CONSTRUCTION CONSTRUED AND CONSTITUTIONS VINDICATED* 155-59 (Da Capo Press 1970) (1820).

143. Details are provided in *THE RESPONSIBLE JUDGE: READINGS IN JUDICIAL ETHICS* 280-85 (John T. Noonan & Kenneth L. Winston eds., 1993).

144. 17 U.S. (4 Wheat.) 518 (1819).

145. U.S. CONST. art. I, § 10.

146. *THE FEDERALIST* NO. 44, at 289-91 (James Madison) (Edward M. Earle ed., 1976).

147. *Dartmouth College*, 17 U.S. at 605-13.

148. *Id.* at 609-10.

promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant."<sup>149</sup> In short, because corporations are "universally" benign institutions, the state that charters them is barred from changing its mind, whatever the popular will. While one might later have distinguished *Dartmouth College* as a case involving a non-profit corporation, it was soon extended, without discussion, to purely commercial firms.<sup>150</sup> On the other hand, Marshall indicated that his holding would not apply to corporations chartered to exercise political power.<sup>151</sup> Thus, the state retained power to dissolve local governments without regard for the wishes or interests of local residents who may have relied upon the existence of their municipal charter.<sup>152</sup>

Writing a half-century later, Thomas Cooley departed from his usually detached style to criticize *Dartmouth College* for its tendency to entrench contract rights so as to forestall legislation needed to prevent antisocial consequences of contract performance. In a footnote in the second edition of his *Constitutional Limitations*, he allowed himself to protest that:

It is under the protection of [that] decision that the most enormous and threatening powers in our country have been created; some of the great and wealthy corporations having greater influence in the country at large, and upon the legislation of the country, than the states to which they owe their corporate existence. Every privilege granted or conferred—no matter by what means or by what pretence—being made inviolable by the Constitution, the government is frequently found stripped of its authority in very important particulars, by unwise, careless, or corrupt legislation; and a clause of the Federal Constitution, whose purpose was to preclude the repudiation of debts and just contracts, protects and perpetuates the evil.<sup>153</sup>

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149. *Id.* at 639.

150. *Charles River Bridge Co. v. Warren Bridge Co.*, 36 U.S. (11 Pet.) 420 (1837).

151. *Charles River Bridge Co.*, 36 U.S. at 629.

152. *E.g.*, *Hunter v. Pittsburgh*, 207 U.S. 161, 178 (1907).

153. THOMAS COOLEY, *CONSTITUTIONAL LIMITATIONS* 335 (2d ed. 1871); see Thomas M. Cooley, *State Regulation of Corporate Profits*, 137 N. AMER. REV. 207 (1883). For an elaborate analysis of the relation of the Cooley treatise to the development of the Contract Clause, see James L. Kaimen, *Nineteenth Century Interpretations of the Federal Contract Clause: The Transformation of Vested to Substantive Rights Against*

*C. The Famous Excess of Joseph Story*

*Swift v. Tyson*<sup>154</sup> was another notable transgression by the Court. Acting on the initiative of Justice Story, it attempted a grand misappropriation of the common law. While the holding was limited in its application to federal diversity cases,<sup>155</sup> Justice Story seems to have envisioned that state courts would adhere to his utterances. His declaration that in such cases the controlling common law is federal in character was achieved by a dubious reading of the Judiciary Act.<sup>156</sup> John Chipman Gray, a man of preeminent wisdom and modesty,<sup>157</sup> attributed the decision to Justice Story's arrogance when he explained:

[Story] was then by far the oldest judge in commission on the bench; he was a man of great learning, and of reputation for learning greater even than the learning itself; he was occupied at the time in writing a book on bills of exchange, which would, of itself, lead him to dogmatize on the subject; he had had great success in extending the jurisdiction of the Admiralty; he was fond of glittering generalities; and he was possessed by a restless vanity. All these things conspired to produce the result.<sup>158</sup>

As Gray forcefully demonstrated, *Swift* was intellectually and politically indefensible. Indeed, in overruling it in 1938, the Court went so far as to denounce the decision as a transgression against the Constitution, for it converted the Judiciary Act into an instrument subverting law made by state courts.<sup>159</sup> For the intervening ninety-six years, the federal courts sheltered many monied interests from the vicissitudes of judge-made state law in cases that could be brought within the federal subject-matter

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*the States*, 31 BUFF. L. REV. 381 (1982).

154. 41 U.S. (16 Pet.) 1 (1842), *overruled by* *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

155. *See Swift*, 41 U.S. at 8.

156. *See id.* at 18-19.

157. Justice Holmes said of Gray: "[W]isdom was the first thing to be mentioned with his name." JOHN CHIPMAN GRAY 49 (Roland Gray ed., 1917).

158. THE NATURES AND SOURCES OF LAW 253 (Roland Gray ed., 2d ed. 1971).

159. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). The story is more fully told in TONY FREYER, HARMONY & DISSONANCE: THE *SWIFT* AND *ERIE* CASES IN AMERICAN FEDERALISM (1981).



jurisdiction.

#### *D. The Notorious Excess of Alexander Taney*

The premier example of indefensible misuse of political power by the Supreme Court is its decision in *Dred Scott*.<sup>160</sup> That 1856 decision declared that the Constitution of the United States conferred no rights on Negroes as citizens and disempowered Congress to prohibit slavery in the territories.<sup>161</sup> The decision, rendered at the private request of President-elect John Buchanan,<sup>162</sup> was without foundation in the text or the tradition from which it emerged.<sup>163</sup> The Court seemingly hoped to save the Union by finding in the Constitution all the rights desired by Southern slaveowners. That hope proved to be as unfounded as the decision itself, which provided the material for the Lincoln-Douglas debates and thus became a central cause of Lincoln's election to the presidency<sup>164</sup> and a precipitant of the war itself.

*Dred Scott* illustrates the hazards of foreclosing political resolution of divisive issues. It is also a superior example of the impotence of the Court to influence the moral and political sentiments of its constituents. No one was convinced by the Court's opinion. It served instead, by purporting to foreclose the existing avenue of democratic political debate and legislative resolution, to inflame an alarmed opposition to the incipient spread of slavery. And those who agreed with the Court's opinion became more deeply entrenched in the view that their claims were rooted in constitutional rights.

President Lincoln, not without cause, mistrusted the Court authoring that misdeed and feared that it would deploy its power to impede the military effort he led to save the Union. On one

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160. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856).

161. *Dred Scott*, 60 U.S. at 404-05.

162. MARTIN SIEGEL, *THE TANEY COURT 1837-1864*, at 66-68 (1987).

163. A recent comment on the opinion is Eric T. Dean, Jr., *Reassessing Dred Scott: The Possibilities of Federal Power in the Antebellum Context*, 60 U. CIN. L. REV. 713 (1992). For a general discussion of the significance of *Dred Scott*, see DON E. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978).

164. JOHN P. FRANK, *LINCOLN AS A LAWYER* 115-23, 135-40 (1961).

occasion, he defied a writ issued by Chief Justice Taney for the release of a Congressman held for inciting draft evasion and considered arresting the Chief.<sup>165</sup> To prevent the Court from other mischief, he persuaded Congress to enlarge the Court to ten members, permitting him to appoint Stephen Field, a reliable unionist, to its membership.<sup>166</sup>

*Dred Scott* was a misadventure persuading a generation of thoughtful lawyers that high courts needed to practice much more restraint in the exercise of the political responsibilities conferred on them by state and federal constitutions. Thomas Cooley's 1868 treatise began with a synthesis of decisions of highest state courts elaborating principles of restraint voiced three decades earlier by Lieber.<sup>167</sup> James Bradley Thayer surely also had *Dred Scott* in mind in 1893, when he brought the imperatives of self-restraint to the attention of a learned audience in a much-noted paper.<sup>168</sup>

#### *E. The Oppressive Excesses of Judicial Darwinists*

The Supreme Court of the United States did not, however, learn the lesson taught by its experience in *Dred Scott*, or by such teachers as Cooley and Thayer. The next great demonstration of the Court's hubris is the series of decisions applying the text of the Fourteenth Amendment ratified in 1868. Invoking the Due Process Clause, the Court invalidated numerous state legislative enactments intended to protect newly industrialized workers and the public from the enormous economic power amassed by the barons of industry.<sup>169</sup> While the point can be

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165. *Ex parte Merryman*, 17 F. Cas. 144 (Cir. Ct. Md. 1861) (No. 9487). For discussion by a later member of the Court, see ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY: A STUDY OF A CRISIS IN AMERICAN POWER POLITICS* 324-27 (1941).

166. PAUL KENS, *JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE* 95-96 (1997).

167. THOMAS M. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 159-88 (Da Capo Press, photo. reprint 1972) (1868).

168. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1883).

169. *E.g.*, *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *Butchers' Union v. Crescent City*, 111 U.S. 746 (1884); *Barbier v. Connolly* 113 U.S. 27 (1884); *Yick*

overborne,<sup>170</sup> it not unreasonably appeared to those who were struggling to protect workers from predation that members of the Court such as Stephen Field and David Brewer were animated by class bias distorting their moral judgment and causing them to suppose state legislatures to be depraved.<sup>171</sup> *Lochner v. New York*,<sup>172</sup> invalidating a law limiting working hours in bakeries, has generally been regarded as the zenith of this disdain, in part because of Justice Holmes' ringing dissent against what he saw as its Darwinist premises.<sup>173</sup> In 1930, near the end of his life, Holmes expressed despair at the Court's chronic arrogance in imposing its classbound prejudices on state legislatures through its self-gratifying interpretations of the Fourteenth Amendment.<sup>174</sup> On the same account, Learned Hand, otherwise an ardent progressive and humanitarian, came to oppose judicial enforcement of the Fourteenth Amendment.<sup>175</sup>

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Wo v. Hopkins, 118 U.S. 356 (1886); Powell v. Pennsylvania, 127 U.S. 678 (1888). See generally HOWARD GILLMAN, *THE CONSTITUTION BESIEGED: THE RISE AND DEMISE OF LOCHNER ERA POLICE POWERS JURISPRUDENCE* (1993) (discussing the significance of cases the Court used to invalidate state enactments intended to protect newly industrialized workers and the public); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 879 (1987) (discussing Justice Holmes' dissenting opinion in *Lochner v. New York*).

170. E.g., Max Lerner, *The Supreme Court and American Capitalism*, 42 YALE L.J. 668, 692 (1933); Howard J. Graham, *The "Conspiracy Theory" of the Fourteenth Amendment*, 47 YALE L.J. 371 (1938). David P. Currie emphasizes that *Lochner v. New York* "did not usher in a reign of terror for social legislation." DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888-1986*, at 49-50 (1990); see also Melvin I. Urofsky, *Myth and Reality: The Supreme Court and Protective Legislation in the Progressive Era*, 1983 Y.B. OF SUP. CT. HIST. SOC'Y 53 (concerning the Court's struggle with protective legislation for labor).

171. Charles McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism*, 61 J. AM. HIST. 970 (1975).

172. 198 U.S. 45 (1905), overruled in part by *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421 (1952) and *Ferguson v. Skrupa*, 372 U.S. 726 (1963).

173. *Lochner*, 198 U.S. at 75-76 (Holmes, J., dissenting). See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 121 (rev. ed. 1959) (discussing Holmes' sympathy for union activity).

174. *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930) (Holmes, J., dissenting). In the opinion, Holmes wrote:

I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. . . . I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable.

*Baldwin*, 281 U.S. at 595 (Holmes, J., dissenting).

175. HAND, *supra* note 21, at 31-55 (1958); Learned Hand *Due Process of Law*

But misuse of the Fourteenth Amendment to invalidate humane state legislation was not the only, or perhaps even the chief, offense of the Court against democratic institutions in the nineteenth century. In fidelity to the text of the Constitution, the Court could have established minimal rights to political participation by enforcing the guarantee of a republican form of government. It chose not to do so.<sup>176</sup> And, even while it was enlarging the Fourteenth Amendment, it was unwilling without enabling legislation to enforce the Fifteenth Amendment affirming the right to vote.<sup>177</sup> Nor was it willing to apply the equal protection clause of the Fourteenth Amendment to intrude on the power of local authorities to draw political boundaries, such as congressional districts, to assure reasonable equality in the right of citizens to be represented in political bodies.<sup>178</sup> The Court thus bears substantial responsibility for the segregation laws enacted by the former slave states in the late nineteenth century to humiliate their voteless black citizens. Had black citizens had the right to vote and been protected from malapportionment, such laws could not have been enacted.

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and the *Eight-Hour Day*, 21 HARV. L. REV. 495 (1908). Theodore Roosevelt, who Hand often followed, proclaimed:

Such decisions are profoundly anti-social, are against the interests of humanity, and tell for the degradation of a very large proportion of our community; and, above all, they seek to establish as an immutable principle the doctrine that the rights of property are supreme over the rights of humanity, and that this free people, this American people, is not only forbidden to better the conditions of mankind, but cannot even strive to do the elementary justice that, among even the monarchies of the Old World, has already been done by other great industrial nations.

FELIX FRANKFURTER & JAMES M. LANDIS, *THE BUSINESS OF THE SUPREME COURT* 194 n.37 (1927) (quoting Theodore Roosevelt, *Workmen's Compensation*, OUTLOOK, May 13, 1911, at 49, 53).

176. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

177. *United States v. Reese*, 92 U.S. 214 (1875); *United States v. Cruikshank*, 92 U.S. 542 (1875). The Amendment was enforced against blatant discrimination in *Ex parte Yarbrough*, 110 U.S. 651 (1884), but various evasions were tolerated, such as a whites-only primary being upheld as late as *Grovey v. Townsend*, 295 U.S. 45 (1935), a case which was overruled in part by *Smith v. Allwright*, 321 U.S. 649 (1944). On the appropriate application of the Amendment, see Akhil Reed Amar, *The Fifteenth Amendment and "Political Rights"*, 17 CARDOZO L. REV. 2225 (1996).

178. *E.g.*, *Snowden v. Hughes*, 321 U.S. 1 (1944); *cf.* *Pope v. Williams*, 193 U.S. 621 (1904) (holding that there is no federal rights violation when a state forces a person to declare his intention to become a citizen of that state before he can register to vote).

In addition, the Darwinist Court placed its power squarely in opposition to the labor movement. Beginning in the 1870s, strenuous efforts were made to organize labor to strike for decent pay and working conditions.<sup>179</sup> The nation was soon afflicted with chronic violence in labor disputes. A nationwide railway strike in 1876 occasioned the invention of the strikebreaking injunction.<sup>180</sup> For over half a century, the federal courts, with the blessing and support of the Supreme Court, broke strike after strike by arresting and imprisoning strike leaders for acts alleged to have been in contempt of court.<sup>181</sup> Rivaling *Dred Scott* in its arrogance was the decision of the Court in *In re Debs*.<sup>182</sup> In that case, a federal court broke a Chicago rail strike at the request of the Attorney General of the United States, despite the lack of any legislative authority for the Attorney General to be involved in the matter, and despite the protest of Illinois Governor Altgeld, who affirmed that there was no danger of serious violence and no need for federal intervention.<sup>183</sup> The Court found judicial authority to enjoin the strike and arrest Eugene Debs for contempt of court in the constitutional provision authorizing the United States to conduct a postal service.<sup>184</sup> In effect, the Court made it an act in contempt for Debs to be a cause of any delay in the delivery of the mail. Between 1876 and 1932, federal courts acting under the supervision of the Supreme Court of the United States issued over four thousand injunctions against strikes.<sup>185</sup> At last, Congress in 1932 withdrew federal jurisdiction to enjoin strikes.<sup>186</sup> But mean-

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179. Harold Aurand, *Anthracite Coal Strike of 1875*, in *LABOR CONFLICT IN THE UNITED STATES: AN ENCYCLOPEDIA* 15 (Ronald L. Filipelli ed., 1990) [hereinafter *LABOR CONFLICT*]; Gerard C. Eggert, *Railroad Strikes in 1877*, in *LABOR CONFLICT*, *supra*, at 441; see also ROBERT V. BRUCE, 1877: YEAR OF VIOLENCE 301-05 (1959) (explaining that violent outbursts by strikers netted gains for employees).

180. Walter Nelles, *A Strike and Its Legal Consequences—An Examination of the Receivership Precedent for the Labor Injunction*, 40 *YALE L.J.* 507, 517-19 (1931).

181. FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 17-46 (1930).

182. 158 U.S. 564 (1894).

183. See *In re Debs*, 158 U.S. at 565.

184. *Id.* at 577-600.

185. WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* 193-98 (1991).

186. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. §§ 101-115 (1994)).

while, for over a half-century, the federal judiciary was shamelessly allied with management against labor, and there was scarcely a thread of legitimacy to cover its abuse of power.

In addition, for almost a half-century, the diversity jurisdiction of the federal courts remained a primary tool of barons of industry seeking to avoid or minimize responsibility to their workers.<sup>187</sup> Adhering to the constitutionally illicit doctrine voiced by Justice Story in *Swift v. Tyson*, the federal judiciary imposed on personal injury claims a body of federal tort law that was notably less generous to plaintiffs than the laws of most states.<sup>188</sup> Claims removable to federal court were worth materially less in settlement than identical claims headed for adjudication in state courts, so the removal jurisdiction was a major weapon in the defense of workers' claims.

Also justifiably resented was the Court's decision invalidating the federal income tax.<sup>189</sup> Such a tax had been collected during the Civil War.<sup>190</sup> In an opinion by Stephen Field, the Court nevertheless denounced it as the commencement of class war.<sup>191</sup> The decision was soon reversed by the ratification of the Sixteenth Amendment.<sup>192</sup>

In reaction against the Darwinist Court, the 1924 platform of the Progressive Party led by Robert La Follette called for the empowerment of Congress to override the Court's decisions invalidating federal legislation much as it can override a veto,<sup>193</sup> a proposal recently renewed in modified form by Robert Bork and bearing a resemblance to the German constitution.

Finally, the Darwinist Court gave its last hurrah in the 1930s by invalidating New Deal legislation.<sup>194</sup> Some of that legislation was properly challenged. For example, many who voted for the National Industrial Recovery Act thought it invalid

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187. See EDWARD A. PURCELL, JR., *LITIGATION AND INEQUALITY: FEDERAL DIVERSITY JURISDICTION IN INDUSTRIAL AMERICA, 1870-1958*, at 104-26 (1992).

188. *Id.* at 264.

189. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 607 (1895), *overruled* by *South Carolina v. Baker*, 485 U.S. 505 (1988).

190. *Pollock*, 157 U.S. at 560-61.

191. *Id.* at 596-97, 607.

192. U.S. CONST. amend. XVI.

193. See WILLIAM E. LEUCHTENBURG, *THE SUPREME COURT REBORN: THE CONSTITUTIONAL REVOLUTION IN THE AGE OF ROOSEVELT* 83 (1995).

194. *Id.* at 132-62.

and were unsurprised when the Court unanimously held it so.<sup>195</sup> But a majority of the Court, led by four superannuated members, soon appeared to be on the verge of invalidating other legislation more cautiously designed to restore hope and trust in the face of a devastating economic collapse and massive unemployment. The most alarming events were a decision invalidating the Guffey Coal Act regulating the bituminous coal industry<sup>196</sup> and another invalidating state legislation setting minimum wages for women employees.<sup>197</sup> Franklin Roosevelt and others feared that the Court's decisions would invalidate labor and social security laws, and that this might cause the Republic itself to unravel. The rise of Mussolini in 1925,<sup>198</sup> the collapse at Weimar in 1933,<sup>199</sup> the attempted murder of the Prime Minister of the Diet of Japan in 1936,<sup>200</sup> and the Fascist crushing of the Spanish republic underway in 1937<sup>201</sup> were examples of political disintegration readily at hand. Although the "kingfish," Huey Long, had been assassinated in 1935 for his pretensions,<sup>202</sup> other aspiring tyrants lurked offstage, rehearsing their lines promising more heroic solutions to the nation's distress.<sup>203</sup>

Roosevelt, like Lincoln in his moment of desperation, proposed to enlarge the Court to dilute the influence of the Nine

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195. See RONEN SHAMIR, *MANAGING LEGAL UNCERTAINTY: ELITE LAWYERS IN THE NEW DEAL* 16-18 (1995).

196. *Carter v. Carter Coal Co.*, 298 U.S. 238, 316 (1936).

197. *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 617-18 (1936), *overruled in part by Olsen v. Nebraska ex rel. W. Reference & Bond Ass'n*, 313 U.S. 236 (1941).

198. See MAX GALLO, *MUSSOLINI'S ITALY: TWENTY YEARS OF THE FASCIST ERA* 204-43 (Charles Lam Markmann trans., 1973).

199. A telling account can be found in S. WILLIAM HALPERIN, *GERMANY TRIED DEMOCRACY: A POLITICAL HISTORY OF THE REICH FROM 1918 TO 1933* (1946).

200. The story is told by JOHN TOLAND, *THE RISING SUN: THE RISE AND FALL OF THE JAPANESE EMPIRE* 3-33 (1970).

201. ROBERT GOLDSTON, *THE CIVIL WAR IN SPAIN* 184-209 (1966).

202. For a taste of Long's demagoguery, see BAZZ HITT, *WHY HUEY P. LONG SHOULD BE PRESIDENT: A MESSAGE TO THE COMMON PEOPLE FROM ONE OF THE FORGOTTEN MEN* (1935). Contemporary assessments of his allegedly fascist bent are JOHN K. FINERAN, *THE CAREER OF A TINPOT NAPOLEON: A POLITICAL BIOGRAPHY OF HUEY P. LONG* (1961), HARRIET KANE, *LOUISIANA HAYRIDE: THE AMERICAN REHEARSAL FOR DICTATORSHIP 1928-1940* (1941), and RAYMOND SWING, *FORERUNNERS OF AMERICAN FASCISM* (1935).

203. See ALAN BRINKLEY, *VOICES OF PROTEST: HUEY LONG, FATHER COUGHLIN AND THE GREAT DEPRESSION* 242-62 (1982).

Old Men whose willful resistance threatened the ability of the Republic to make a serious response to the economic calamity. If the fears of Roosevelt and those who supported his plan, such as Senator Hugo Black,<sup>204</sup> and many disinterested academic observers were factually justified, then Court-packing was warranted, despite the ardent protests of the American Bar Association and others that the action sacrificed the cherished independence of the federal judiciary.<sup>205</sup> A defect in the plan was its disingenuous preoccupation with the age of the Justices who posed the threat. While the plan was perhaps in its details ill-conceived and was defeated, it appeared to have intimidated the Court: Justice Roberts, in the famous "switch in time,"<sup>206</sup> seemingly reversed his former position and voted to uphold a state minimum wage law,<sup>207</sup> the National Labor Relations Act,<sup>208</sup> and the Social Security Act.<sup>209</sup>

#### F. *The Humanitarian Excesses of the Warren Court*

A shift in the Court's political orientation was marked in 1938 by Chief Justice Stone's famous footnote 4,<sup>210</sup> but the public was not fully aware of it until the decision of *Brown v. Board of Education*<sup>211</sup> in 1952. Thereafter, the Court was seen as a partisan political agent, but for a different set of causes than the Darwinism animating their immediate predecessors, causes reflecting the politics of a social and intellectual elite rather than an economic one.

The Court was obliged in *Brown* to challenge racial segrega-

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204. ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 210-11 (1994). In reflecting on his study of the problem, Senator Black observed, "I regret to say that a real study of impartial history has changed a great many of my preconceived ideas about the aloofness of the Supreme Court on political issues." *Id.* at 210.

205. Some saw the plan as the first step in establishing an American fascist state. LEUCHTENBURG, *supra* note 193, at 137.

206. See Richard Friedman, *Switching Time and Other Thought Experiments: The Hughes Court and Constitutional Transformation*, 142 U. PA. L. REV. 1891 (1994).

207. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937); LEUCHTENBURG, *supra* note 193, at 140-42.

208. *NLRB v. Jones & Laughlin Corp.*, 301 U.S. 1, 30 (1937).

209. *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548, 597-98 (1937).

210. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 (1938).

211. 344 U.S. 1 (1952), *rev'd*, 349 U.S. 294 (1955).



tion of public school students. Had it not done so, it would have appeared pitifully short on both moral courage and moral judgment, for not only was there widespread disapproval of the black codes, even among many citizens in states that had enacted them, but the practice of school segregation was offensive to the principle of the Fourteenth Amendment as it had been understood even at the time of its ratification and also to the political morality nurtured by a total war against a racist fascism. The decision in *Brown* nevertheless evoked a strong reaction in those states among a majority of the white voters who still favored such laws.<sup>212</sup> While *Brown* stands as the shining example of the good deeds that politically animated, life-tenured judges may on occasion perform, it is, in hindsight, error to regard the decision and its progeny as a mark of the Court's wise moral leadership.

First, it bears emphasis that the enactment of segregation laws had been facilitated by the Court's partisan participation in the "redemption" of the South when it denied enforcement of the Fifteenth Amendment. Even in the twentieth century, the Court might have exhibited greater political wisdom had it tackled the voting rights problem first. Had that been done as the Fifteenth Amendment explicitly provided, and had the Court rigorously enforced the previously acknowledged right of minority schoolchildren to equal funding and facilities, many school districts, even in the deep South, would have seen the wisdom of desegregating on their own initiative.

Second, it is sad to recall that only Kansas plaintiff, Linda Brown, ever attended a desegregated school, and none of her co-plaintiffs ever found themselves in a desegregated classroom.<sup>213</sup> That was a consequence of the Court's timidity in allowing states to proceed "with all deliberate speed" to accomplish the required desegregation. One effect of the Court's failure to exhibit the courage of its conviction was to give proof to the public that it was not engaged in the routine judicial work of enforcing Linda Brown's rights, but was *primarily* engaged in

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212. See RICHARD A. KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* 710-11 (1976).

213. FRANK T. READ & LUCY S. MCGOUGH, *LET THEM BE JUDGED: THE JUDICIAL INTEGRATION OF THE DEEP SOUTH* 17 (1978).

social engineering. Another was to give Jim Crow politicians ample time to arouse resistance to implementation of the political decree. It may be that the "all deliberate speed" formula was an expression of the Court's mistaken belief that segregationists would read its opinion and accept its wisdom and authority. Nothing of that kind happened, as the Court should have anticipated from its many previous experiences with broad and unpersuasive utterances of morals or economics, from *Dred Scott* to *Debs* to *Lochner*.

Third, when segregationists did not knuckle under, the Court responded with what now seems an overbearing exercise of its power. Its timidity oscillating into apparent anger, the Court not only compelled the desegregation of segregated schools, but also ordered lower federal courts to reorganize and manage many public schools, and not merely in the South where segregation was *de jure*.<sup>214</sup> Decrees compelling bussing on a metropolitan scale everywhere that a record of racial bias could be found uprooted neighborhood schools in black neighborhoods as well as white.<sup>215</sup> Sacrificed to the Court's futile effort to promote racial integration was the vital relationship between public education and the family. Meanwhile, the spirit of Southern red-necks who wanted to impeach Earl Warren was nationalized by the politics of George Wallace, who denounced the "pointy-headed intellectuals" and marshaled a huge vote in the 1968 Democratic primaries in northern states.<sup>216</sup> More than a few black families were distressed by what the Court had done.<sup>217</sup> Many individual federal judges were subject to strenuous efforts to intimidate them.<sup>218</sup> I recall the bumper stickers seen in Mich-

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214. For an account of the meager results of desegregation efforts from 1954 to 1964, see GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* 41-71 (1991).

215. See generally *LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION* (Howard I. Kalodner & James J. Fishman eds., 1978) (explaining the problems of desegregation in several large, metropolitan cities in the United States).

216. See DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 331-70 (1995).

217. Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470, 472-82 (1976).

218. For an account of some of them, see JACK BASS, *UNLIKELY HEROES: THE DRAMATIC STORY OF THE SOUTHERN JUDGES OF THE FIFTH CIRCUIT WHO TRANSLATED THE SUPREME COURT'S BROWN DECISION INTO A REVOLUTION FOR EQUALITY* (1981).

igan calling not for the impeachment, but the assassination, of Judge Stephen Roth, who ordered the bussed integration of all the schools in metropolitan Detroit.<sup>219</sup> That extreme reaction was most visible among the population of westside suburbs populated by the offspring of twentieth-century immigrants from eastern Europe who perceived no reason why their children should bear the burden of desegregating schools for sins they did not commit. Poor Judge Roth, who died of a heart attack during the time of stress, was himself a native of Hungary, and was likely responding in his order to the evidence that the burden of desegregation, if limited to the city of Detroit, would fall entirely on those least able to bear it; this would leave the executive class residing in Grosse Pointe and Bloomfield Hills free of any inconvenience. It would be unjust to blame the present plight of American public schools on the Court's improvidence in the desegregation cases, but surely the Court played a role in the widespread disaffection experienced by the public schools, institutions that remain our best hope for social integration of diverse races and classes.

Despite these blemishes on the Court's performance, some have credited the Supreme Court with the advances in race relations occurring in the United States since the decision in *Brown*. But the Court deserves no large share of the credit. *Brown* was an emblem for a moral change that had largely occurred before the Court acknowledged it.<sup>220</sup> Jim Crow may have died in a Nazi gas chamber. Moreover, economic changes resulting in mobility of people of all colors had undermined the social conditions from which Jim Crow had emerged.<sup>221</sup>

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219. See *Bradley v. Milliken*, 338 F. Supp. 582 (E.D. Mich. 1971), *rev'd in part*, *Milliken v. Bradley*, 418 U.S. 717 (1974). See generally Elwood Hain, *Sealing Off the City: School Desegregation in Detroit*, in *LIMITS OF JUSTICE*, *supra* note 215, at 223 (describing the effort to create a remedy in a predominately black school district in the aftermath of *Milliken v. Bradley*); Symposium, *Milliken v. Bradley and the Future of Urban School Desegregation*, 21 WAYNE L. REV. 751 (1975) (containing articles discussing the *Bradley* holding and school district reorganization to attain desegregation).

220. See Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 21-23 (1996); Michael J. Klarman, *Brown, Originalism and Constitutional Theory: A Response to Professor McConnell*, 81 VA. L. REV. 1881, 1934 (1995).

221. See NICHOLAS LEMANN, *THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA* 345 (1991).

Desegregation gained its major *legal* impetus not from *Brown*, but from the Civil Rights Act of 1964.<sup>222</sup> That Act was less the product of *Brown* than of the assassination of John Kennedy. And had the Fifteenth Amendment been timely enforced, the federal civil rights legislation would likely have been enacted no later than 1948.<sup>223</sup> More importantly, desegregation was achieved less by legal enactment than by the moral leadership of persons such as Rosa Parks,<sup>224</sup> Martin Luther King,<sup>225</sup> and Jackie Robinson.<sup>226</sup> When Jackie Robinson stole home, some people changed their minds. When Rosa Parks refused to sit in the back of a Montgomery bus, more people changed their minds. When King faced down police dogs and firehoses and went to jail for justice, still more people changed their minds. However, few if any minds were changed by Court opinions.

The experience with desegregation thus tends to confirm Thomas Cooley's dictum that law not expressing the common thoughts of men is feeble.<sup>227</sup> When the Court in *Brown I* sounded the common thoughts of men, it played a useful, albeit modest, role in reinforcing moral aspirations by elevating them to the status of constitutional law. However, when it tried to lead by broadly coercive means, as it did in later cases ostensibly implementing *Brown II*, it lacked sufficient public support to achieve its aims, and its decrees may on balance have been counterproductive.

A secondary effect of the Court's commitment to civil rights was the loss of any remnant shred of respect for the value of federalism. There can be no doubt that the battle cry of "states'

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222. GARY ORFIELD, *THE RECONSTRUCTION OF SOUTHERN EDUCATION: THE SCHOOLS AND THE 1964 CIVIL RIGHTS ACT* 1-4 (1969).

223. President Truman proposed civil rights legislation on February 2, 1948; at that time, the Republican Party was the political organization supported by most black Americans. Thus, Truman forfeited the support of the previously "Solid" South. For an account, see DAVID MCCULLOUGH, *TRUMAN* 586-95 (1992).

224. TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 125 (1988); MARTIN LUTHER KING, JR., *STRIDE TOWARD FREEDOM: THE MONTGOMERY STORY* 151-80 (1958).

225. DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 83-125 (1986).

226. See ARNOLD RANPERSAD, *JACKIE ROBINSON: A BIOGRAPHY* 460 (1997).

227. See HARVARD UNIVERSITY, *supra* note 41. For further reflections on Cooley's view, see Paul D. Carrington, *Law as "The Common Thoughts of Men": The Law-Teaching and Judging of Thomas McIntyre Cooley*, 49 *STAN. L. REV.* 495 (1997).

rights!" was a scam uttered to protect Jim Crow. Unfortunately, that misuse of the idea of federalism drove thoughtful citizens (this citizen included) to reject its worthy premise and may have caused the Warren Court to further devalue the importance of state and local autonomy in making decisions of primary importance to the communities in which we live and vote. While there are many political issues that are in a global village unsuited to local governance, and the right of members of racial minorities to equal protection is surely among them, that reality should dictate that the elite national class withhold its impositions on other matters whenever that can be done without serious jeopardy to a truly national interest. In 1852, Francis Lieber explained both the democratic tradition sustaining the Republic and individual rights as products of local pluralism.<sup>228</sup> He argued that centralization of the sort practiced in Napoleonic France and Prussia was antithetical to both self-government and civil liberty.<sup>229</sup> Thomas Cooley,<sup>230</sup> Louis Brandeis,<sup>231</sup> and Ernst Freund<sup>232</sup> were among an illustrious group who joined in celebrating local government. But after *Brown II*, the Court and its followers ceased to credit such thoughts and concerns.

Thus, metropolitan desegregation is by no means the only example of the Warren Court's tendency to ineffectual excess. When the Court at last acknowledged responsibility for the political rights of citizens, it went on to proclaim the principle of "one man, one vote,"<sup>233</sup> and to extend the principle to both houses of

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228. FRANCIS LIEBER, ON CIVIL LIBERTY AND SELF-GOVERNMENT (Theodore D. Woolsey ed., Da Capo Press 1972) (1853).

229. *Id.* A second edition was published in Boston in 1874, edited by Theodore M. Woolsey, the President of Yale; a third edition was published in 1905, edited by Theodore S. Woolsey, the Dean of the Yale Law School.

230. Carrington, *supra* note 227, at 535-39.

231. See especially his dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("To stay experimentation in things social and economic is a grave responsibility.").

232. OSCAR KRAINES, THE WORLD AND IDEAS OF ERNST FREUND: THE SEARCH FOR GENERAL PRINCIPLES OF LEGISLATION AND ADMINISTRATIVE LAW 129-32 (1974).

233. *Baker v. Carr*, 369 U.S. 186, 207-08 (1962). As Judge Posner has observed, even this necessary step was done so as to cause almost perpetual ferment in the districting and redistricting of state and local constituencies. POSNER, *supra* note 56, at 326. Whether this has made state and local government more effective for any useful purpose may remain in reasonable doubt.

bicameral legislatures.<sup>234</sup> This decision ignored both the resemblance to the Constitution of the United States of state constitutions' creating an upper house giving representation to fixed geographical units and the lack of a coherent reason why states could not similarly protect rural counties from urban dictates.<sup>235</sup> Remarkably, the Court held that the people of Colorado, even by an overwhelming referendum vote, could not provide that their upper house members would represent localities of unequal populations, including a substantial majority in the most populous (and thus the most underrepresented) area.<sup>236</sup> In so holding, the Court gave additional evidence of its chronic disregard of local self-government as a fundamental democratic institution. These decisions were also rendered in disregard of the boundless opportunities for gerrymandering they created, thereby exposing highest state courts to novel political temptations and correspondingly elevated political pressures.

In addition, the Warren Court invoked the Fourteenth Amendment to exercise control over criminal law and procedure administered by the states. This entailed a radical departure from earlier interpretations of the Amendment with respect to its application to criminal proceedings in state courts.<sup>237</sup> As in *Brown*, the Court was doubtless overdue in at last recognizing a constitutionally protected right to counsel of persons charged with grave crimes.<sup>238</sup> Some of what it required, such as the *Miranda* warning,<sup>239</sup> radically disturbed conventional law enforcement in station houses across the country, but with little beneficial effect. *Miranda* itself was overruled by Congress in its application to federal courts<sup>240</sup> and was soon reduced to a for-

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234. See *Reynolds v. Sims*, 377 U.S. 533 (1964).

235. See *Reynolds*, 377 U.S. at 557-58.

236. See *Lucas v. The Forty-Fourth Gen. Assembly*, 377 U.S. 713, 735-39 (1964).

237. See, e.g., *Adamson v. California*, 332 U.S. 46, 48-59 (1947), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964); *Palko v. Connecticut*, 302 U.S. 319 (1937), *overruled* by *Benton v. Maryland*, 395 U.S. 789 (1969); *Twining v. New Jersey*, 211 U.S. 78 (1908), *overruled in part* by *Malloy v. Hogan*, 378 U.S. 1 (1964).

238. See *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Massiah v. United States*, 377 U.S. 201 (1964). For earlier advocacy of recognition of such a right, see COOLEY, CONSTITUTIONAL LIMITATIONS, *supra* note 153, at 334.

239. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

240. Crime Control Act of 1968, Pub. L. No. 90-391, 82 Stat. 210 (codified as amended at 18 U.S.C. § 3501 (1994)); cf. *Michigan v. Tucker*, 417 U.S. 433, 450 (1974) (holding that the statements of a witness revealed in the statements of the

malism by state and local police.<sup>241</sup> There is even reason to suspect that *Miranda* may have uselessly diminished the effectiveness of law enforcement, as the police have so long contended.<sup>242</sup>

When the Court expanded the use of exclusionary rules as a restraint on illegal searches by state and local police,<sup>243</sup> it forestalled punishment for many persons who were almost certainly responsible for serious crimes, resulting in a political backlash that remains with us today in the form of the Victims' Rights Movement,<sup>244</sup> which seems not unlikely to succeed in amending the Constitution.

Indeed, apparently in response to political disapproval of what it had wrought, the Court itself undid much of its work on state criminal procedure by actively restricting access to the writ of habeas corpus in lower federal courts.<sup>245</sup> Without that form of federal review, state courts were freed to interpret the Court's constitutional doctrines in diverse ways that in significant respects limited their applications to the conduct of state police.<sup>246</sup>

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accused are admissible and not in violation of the Constitution); see also JEROLD H. ISRAEL ET AL., *CRIMINAL PROCEDURE AND THE CONSTITUTION: LEADING SUPREME COURT CASES AND INTRODUCTORY TEXT* 323-93 (1997) (discussing the *Miranda* case and later decisions applying it).

241. The authors of the interrogation manual criticized by the Court in *Miranda* were soon able to boast that "all but a very few of the interrogation tactics and techniques presented in our earlier publication are still valid." FRED E. INBAU & JOHN E. REID, *CRIMINAL INTERROGATIONS AND CONFESSIONS* 1 (2d ed. 1967).

242. See Paul G. Cassell & Richard Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055, 1106 (1998). But see Paul G. Cassell & Richard Fowles, *Falling Clearance Rates After Miranda: Coincidence or Consequence?*, 50 STAN. L. REV. 1181, 1183-84 (1998); John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1149-51 (1998).

243. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961), overruling *Wolf v. Colorado*, 338 U.S. 25 (1949).

244. Richard Barajas & Scott Alexander Nelson, *The Proposed Crime Victims' Federal Constitutional Amendment: Working Toward a Proper Balance*, 49 BAYLOR L. REV. 1, 2-7 (1997); Robert P. Mosteller, *Victims' Rights and the United States Constitution: An Effort to Recast the Battle in Criminal Litigation*, 85 GEO. L.J. 1691, 1692 (1997).

245. See, e.g., *Teague v. Lane*, 489 U.S. 288, 298 (1989); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 385 (1996).

246. See Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Liti-*

In addition, the Warren Court flirted with the abolition of capital punishment by holding that as practiced in state courts it was unconstitutional.<sup>247</sup> In response to public outcry against this decision, state legislatures patched up their procedures, and the Court backed down.<sup>248</sup> There followed an epic increase in the number of executions,<sup>249</sup> with the Court itself expressing impatience with delays in its administration.<sup>250</sup> It would be incorrect to attribute to the Court's action the enormous change in the public attitude toward capital punishment occurring in the years following its decision calling the practice into question, but its decision was almost certainly a contributing cause,<sup>251</sup> and the event is an additional confirmation of the impotence of the Court to effect change in deeply held popular beliefs.

### *G. The Habitual Excesses of the Burger Court*

Chief Justice Warren seems not to have been an essential source of the Court's inclination to misuse its political power to effect reform, for the misuse continued apace when he was replaced in 1972 by Chief Justice Burger, a person of a quite different political persuasion.

An early decision of the Burger Court (or was it still the Brennan Court?) was to savage by subtle means the popular

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gation Reform Act, 47 DUKE L.J. 1, 6-11 (1997); Ronald Wright & Marc Miller, *Leaky Floors: State Criminal Procedure Below Federal Limits* (Apr. 23, 1998) (unpublished draft on file with author).

247. See, e.g., *Furman v. Georgia*, 408 U.S. 238 (1972). See generally MICHAEL MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* 66-67 (1973) (describing the Warren Court's influence on the evolution of capital punishment).

248. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976) (holding that Georgia's bifurcated statutory system of trying capital cases was constitutional).

249. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *DEATH ROW USA REPORTER* 733-39 (1994); see also WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* (1991) (describing the Court's role in monitoring capital punishment and vital statistics in the death penalty's application).

250. *Gomez v. United States*, 503 U.S. 653, 654 (1992).

251. See generally Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflection on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995) (arguing that the body of doctrine produced by the Court is unresponsive to the concerns that led to the regulation of capital punishment and may have helped entrench the practice of capital punishment in the United States).



institution of the right to jury trial in civil cases.<sup>252</sup> In the face not only of ancient tradition expressed in the Seventh Amendment, but also into the teeth of two federal statutes and a rule promulgated by the Court itself, the Court held in *Colgrove v. Battin* that a federal district court could by local rule cut the size of the jury in half.<sup>253</sup> Geoffrey Hazard described the Court's opinion as "monumentally unconvincing."<sup>254</sup> An effect of the decision was to make jury verdicts less predictable, evoking cries of anguish over both outlying verdicts that must be corrected by judicial intervention and new impediments to settlement negotiations.<sup>255</sup> Justice Marshall, in his dissent in *Colgrove*, was incredulous that the Court could have so little regard for a democratic institution so integral to the role of the federal judiciary in the constitutional scheme.<sup>256</sup>

Then there was *Roe v. Wade*.<sup>257</sup> Whatever its merits as policy, the principle espoused by the Court in *Roe* had no more foundation in the text or tradition of the Constitution than had *Dred Scott* or *Debs*.<sup>258</sup> Unlike those two pieces of nineteenth-century mischief, *Roe* lacked the justification of a crisis to be confronted; there was no civil war or revolution in sight that the Court could have thought it was averting. Quite the contrary: many state legislatures were actively entertaining arguments for abortion rights; four states, including New York, had recently revised their law to accommodate abortion rights, and the number of legal abortions in the United States was in a perpendicular

252. See *Colgrove v. Battin*, 413 U.S. 149 (1973).

253. *Colgrove*, 413 U.S. at 160.

254. FLEMING JAMES, JR. & GEOFFREY C. HAZARD, *CIVIL PROCEDURE* § 8.12, at 453 (3d ed. 1985); see also Paul D. Carrington, *The Seventh Amendment: Some Bicentennial Reflections*, 1990 U. CHI. LEGAL F. 33, 51-53 (describing the evolution of the civil jury).

255. Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 28-32 (1993).

256. *Colgrove*, 413 U.S. at 166 (Marshall, J., dissenting).

257. 410 U.S. 113 (1973).

258. Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Elite: A Prolegomenon*, 1976 BYU L. REV. 43, 85; John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 947 (1973); Richard A. Epstein, *Substantive Due Process by Any Other Name: The Abortion Cases*, 1973 SUP. CT. REV. 159, 184-85; Henry Paul Monaghan, Comment, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 124-25 (1978). For a review of the many failed efforts to find a constitutional basis for *Roe*, see POSNER, *supra* note 55, at 179-82.

climb.<sup>259</sup> A substantial reform commissioned by the Texas legislature giving the plaintiffs most of what they wanted was in the advanced stages of development, presentation, and probable enactment.<sup>260</sup> There was scattered resistance to legislative reform, chiefly among Catholic organizations, but it lacked force in most states. After all, women were then, as now, a majority in the electorate; those favoring abortion rights were not disadvantaged in their access to a political forum.

The Court, it seems, simply could not wait to get out in front of a political movement that its members and its elite audience approved of. This tends to be confirmed by the opinion in *Roe*, which eschewed a narrow holding. The Texas statute challenged was nineteenth-century legislation allowing no exceptions to its proscription of abortions.<sup>261</sup> Imaginably, the statute might have been invalidated on grounds of desuetude.<sup>262</sup> Such a holding would have accelerated the political debate on abortion rights instead of pretermittting it. But a majority of the Court was so beguiled by a seemingly simple and popular answer<sup>263</sup> to a complex social and moral problem that it supposed itself justified in imposing it on the political institutions of the states in the broadest possible terms. The opinion set a new standard for institutional arrogance, as Justice White recognized at once.<sup>264</sup>

If members of the Court thought they would persuade the public to their view, now they must by be disabused. Their opinion in *Roe* had no more persuasive effect than did that of their predecessors in *Dred Scott*. The Right to Life Movement has been in large measure a reaction against the Court's impru-

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259. ROSENBERG, *supra* note 214, at 179.

260. Albert Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 420 n.166 (1997); see also SUNSTEIN, *supra* note 37, at 180 (discussing the Court's constitutional interpretation in *Roe* and its effect on democratic processes in the United States).

261. *Roe*, 410 U.S. at 119.

262. On desuetude, see GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 17-24 (1982).

263. Popular, that is, with the elite governing class to whom the Court traditionally responds. For a defense of its conformity to that opinion, see William E. Nelson, *History and Neutral Principles in Constitutional Adjudication*, 72 VA. L. REV. 1237, 1270-75 (1986).

264. HUTCHINSON, *supra* note 58, at 365-71.

dence. There being no political forum in which its exponents could be heard, those in the medical profession practiced defiance,<sup>265</sup> while others took to the streets and became violent.<sup>266</sup> Those violent reactions have no counterpart in the politics of other nations, even predominantly Catholic ones that have substantially legalized abortion in recent years.<sup>267</sup> Because of the violence for which the Court may be indirectly responsible, it may, as Judge Posner has remarked,<sup>268</sup> be more difficult in many communities for a woman to secure an abortion today than it was a quarter of a century ago when *Roe* was decided.<sup>269</sup> Among the lesser problems created by *Roe* has been the First Amendment issue associated with violent and non-violent utterances of Right to Lifers addressed to clients of abortion clinics.<sup>270</sup>

Unwise use of the judicial power to foreclose state and local politics was also exhibited in the extensions of the First Amendment occurring in the Burger years. Enforcement of the First Amendment is among the most solemn duties of the Supreme Court, and some of its most admirable moments have come in the performance of that duty.<sup>271</sup> In the 1920s, the Court reasonably extended First Amendment restraints to state and local government by incorporating that provision into the Due Process Clause of the Fourteenth Amendment,<sup>272</sup> although the textual basis for that extension was weak and its legitimacy marginal. The compass of the First Amendment at the time it was incorporated into the Fourteenth was, however, quite narrow.<sup>273</sup> It gave protection to speech related to religious observance and

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265. ROSENBERG, *supra* note 214, at 189-95.

266. See Jacquelin Darroch Forres & Stanley K. Henshaw, *The Harassment of U.S. Abortion Providers*, 19 FAM. PLAN. PERSP. 9, *passim* (1987).

267. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 145-57 (1987).

268. POSNER, *supra* note 56, at 325-26.

269. But see David J. Garrow, *All over but the Legislating: There Was a Genuine War over Abortion, These Writers Think, but the Armistice Appears Durable*, N.Y. TIMES, Jan. 25, 1998, § 7, at 14 (book review).

270. See, e.g., *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 772-74 (1994).

271. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 167 (Jamie Kalven ed., 1988).

272. *Gitlow v. New York*, 268 U.S. 652, 666-70 (1925); see DANIEL A. FARBER & SUZANNA SHERRY, A HISTORY OF THE AMERICAN CONSTITUTION 366-67 (1990).

273. DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 344 (1997).

political expression motivated by conscience and a regard for truth, and even that protection was not expressed in absolute terms. But the Court, in its zeal, has not known when to stop. It has now disabled not only the federal government, but state and local government with respect to a wide range of moral issues exciting public concern.<sup>274</sup>

One example is pornography. Traditionally, the issue of obscenity was treated as an issue of fact to be resolved according to local standards, often by a local jury.<sup>275</sup> While the Court did not recant the position that obscenity is unprotected by the First Amendment, it took upon itself the determination whether particular material is obscene.<sup>276</sup> With the possible exception of the proscription of child pornography,<sup>277</sup> "one cannot say with certainty that material is obscene until at least five members of this Court . . . have pronounced it so."<sup>278</sup> The effect has been substantially to pretermitt political debate about the proper bounds of obscenity. Neither those who regard pornography as a threat to the Victorian mores they hope to transmit to their children, nor those who regard it as "the undiluted essence of anti-female propaganda,"<sup>279</sup> nor those who, with Justice Douglas, favor absolute license<sup>280</sup> have a political forum in which to express their views. Some people have had ready access to films and books that they would not have had but for the Court's decision, but city fathers and voters across the continent have been stripped of the right to participate in decisions regarding the availability of much "art" of dubious redeeming value.

The more restrained position, voiced by Justice Harlan, was that the First Amendment could and should have been applied

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274. See generally CASS SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* (1993) (discussing the need for a less restrictive application of the First Amendment).

275. *Hamling v. United States*, 418 U.S. 87, 104 (1974).

276. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); *Miller v. California*, 413 U.S. 15, 25-26 (1973); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 69 (1973).

277. See *New York v. Ferber*, 458 U.S. 747, 756-57 (1982).

278. *Paris Adult Theatre I*, 413 U.S. at 92 (Brennan, J., dissenting).

279. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 394 (1975).

280. See, e.g., *Roth v. United States*, 354 U.S. 476, 508-13 (1957) (Douglas, J., dissenting). See generally David F. McGowan, *A Critical Analysis of Commercial Speech*, 78 CAL. L. REV. 359 (1990) (analyzing the need for a less strict application of the First Amendment to commercial speech).

to state and local law with a much lighter touch, allowing local communities to have radically divergent standards.<sup>281</sup> What of national consequence was achieved by preventing the city fathers of Atlanta from foolishly barring exhibition of *Carnal Knowledge*?<sup>282</sup> Everyone who wanted to do so would have seen the film anyway, even if the city mounted an enforcement campaign roughly equivalent to that conducted against the sale of liquor during the days of Prohibition. Indeed, many would have paid to see what the flap was about, and the voters would very likely have thrown the rascals out for their poor judgment about film art. The advent of the Internet has made it almost impossible to impede the distribution of pornography. All the more reason, some communities may perhaps rightly say, it is important for state and local governments to express their sexual moralities in legal form. There is no need for the Court to weigh in on the side of those who seek to turn a profit from the human weakness for voyeurism.

Another overextension of the First Amendment has been constitutional protection of commercial speech,<sup>283</sup> disabling political institutions from dealing with such debatable public issues as advertising of legal services<sup>284</sup> or liquor.<sup>285</sup> Advertising of legal services has perhaps produced competition among

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281. *A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney Gen. of Mass.*, 383 U.S. 413, 455-57 (1966) (Harlan, J., dissenting); *Smith v. California*, 361 U.S. 147, 169 (1959) (Harlan, J., dissenting).

282. See, e.g., *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974).

283. In dealing with regulations of "commercial speech," the Court has fashioned a so-called "intermediate" measure of protection, less than that afforded political or religious speech. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 562-63 (1980).

284. E.g., *Ibanez v. Florida Dep't of Bus. and Prof'l Regulation*, 512 U.S. 136, 139 (1994); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). The Court recently divided 5-4 in holding that a state may impose a thirty-day waiting period before lawyers can solicit accident victims. *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 635 (1995).

285. The Court has recently held that a state may not forbid the advertising of liquor, the Twenty-First Amendment notwithstanding. *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996); see also *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 485 (1995) (holding that a federal statute prohibiting manufacturers from displaying alcohol content on beer cans violated the First Amendment). *But cf.* *Posadas de Puerto Rico Assocs. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 344 (1986) (holding that a Puerto Rican statute restricting advertising of casino gambling was constitutional).

lawyers reducing somewhat the price of their services,<sup>286</sup> but it has also likely contributed to the poor reputation of the legal profession, and thus of the law it administers. What on balance may be the wisest course for a state in regulating or not regulating such advertising is a question on which the Constitution of the United States has no appropriate bearing, for it has nothing to do with political or religious expression that is the concern of the First Amendment.

Another overreaching has been constitutional protection for symbolic speech, preventing states and local governments from protecting such symbols as the American flag.<sup>287</sup> There are good reasons a free society ought to tolerate disrespect for its symbols. On the other hand, symbols are very important to some people and some communities, and there is no sufficient reason to deprive the citizens of a state or city of the authority and responsibility for the decision to tolerate or not to tolerate acts of provocative disrespect, or to deprive highest state courts of responsibility for interpreting state constitutional provisions bearing on such matters.

Yet another overreaching has been the Court's constitutionalization of the right to spend money to publicize views and influence the outcome of elections.<sup>288</sup> Such decisions have substantially disabled state and local governments from assuring the integrity of our elections. It presently appears to be constitutional law that those citizens or interest groups having

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286. For a discussion of the effect of competition among lawyers on lawyers' incomes, see Richard H. Sander & E. Douglass Williams, *Why Are There So Many Lawyers?: Perspectives on a Turbulent Market*, 14 J. LAW & SOC. INQ. 431, 474-77 (1989).

287. *E.g.*, *United States v. Eichman*, 496 U.S. 310, 318-19 (1990); *Street v. New York*, 394 U.S. 576, 581 (1969).

288. *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 501 (1985); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 300 (1981); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 784 (1978); *Buckley v. Valeo*, 424 U.S. 1, 54 (1976). *But cf.* *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 655 (1990) (upholding a state statute limiting money a corporation can give to a candidate). For a vigorous defense of the Court's application of the First Amendment, see Bradley A. Smith, *Money Talks: Speech, Corruption, Equality, and Campaign Finance*, 86 GEO. L.J. 45, 64 (1997); see also Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1086 (1996). For a comprehensive review of the problems raised by the Court's decisions, see CAMPAIGN FINANCE REFORM: A SOURCEBOOK 61-92 (Anthony E. Corrado et al. eds., 1997).

the most wealth, or the largest economic stake in government policy, have the right to purchase with campaign funds (if they can) the loyalties of those seeking public office, and to drown out in the media those groups lacking resources.<sup>289</sup> Why, if people have the right to use money to buy influence with a legislature, should they not be equally entitled to buy a court? It might seem to follow that, in order to protect individual rights guaranteed by the First Amendment, Supreme Court Justices should be elected in high-cost, high-tech campaigns in which big spenders can secure consideration of their interests. It is as if the Court has decided to concentrate in itself all the visible integrity of the government, reducing all elected officials to the status of enslavement to corrupting "special interests."

Although an early aim of the First Amendment was to protect the institutions of self-government,<sup>290</sup> the Court has, by incorporating the First Amendment into the Fourteenth and then expanding its reach far beyond any limits previously contemplated for constitutional limitations on the legislative powers of states, deployed the First Amendment to protect those seeking to subvert the institutions of self-government. The Fourteenth Amendment has become an enactment not of "Herbert Spencer's Social Statistics," but of the libertarian principles of John Stuart Mill,<sup>291</sup> a set of principles fashioned in response to the politics of Queen Victoria and at odds with the rights of citizens to participate in a political process equally open to participation by all

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289. J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625 (1982).

290. This was in the minds of those who drafted and many of those who ratified the Amendment, but the issue remained murky through the last years of the eighteenth century. For discussion, see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 122-23 (1989); William T. Mayton, *Seditious Libel and the Lost Guarantee of Freedom of Expression*, 84 COLUM. L. REV. 91, 108-19 (1984); Gerald A. Berlin, *Leonard W. Levy's LEGACY OF SUPPRESSION*, 72 YALE L.J. 631, 635-37 (1963) (book review).

291. See MILL, *supra* note 69. See generally OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996) (analyzing the meaning of liberty through free speech and press). The complexity of the relation between communitarian and individualistic interpretations of the First Amendment is also helpfully explored in Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997). See also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1948) (exploring what is meant by freedom of speech).

citizens. One may want to protect the right to burn the American flag and see *Carnal Knowledge*, allow the wealthy to spend on politics to their heart's content, or allow distillers to advertise whiskey, and yet reckon that these are questions properly addressed to democratic institutions in which we are entitled to participate as citizens. Our Platonic Guardians have no special insights into any of these matters making their judgment worthy of more respect than that of a popular assembly, however "wayward."

Archibald Cox's evaluation merits endorsement:

Nearly all the rules of constitutional law written by the . . . Court relative to individual and political liberty, equality, and criminal justice, impress me as wiser and fairer than the rules they replace. I would support nearly all as important reforms if proposed in a legislative chamber or a constitutional convention. In appraising them as judicial rulings, however, I find it necessary to ask whether an excessive price was paid by enlarging the sphere and changing the nature of constitutional adjudication.<sup>292</sup>

This two hundred years of experience confirms Senator Hatch's contention that the institutional arrogance of the Supreme Court is nonpartisan. In some eras, the Court has overplayed its role to protect monied might, while in others it has overplayed its role to extend rights valued by beleaguered minorities or individuals. The constitutional mission of the Court makes the protection of monied might, minorities, and even cranks its rightful business. But a constant in the Court's performance has been its disregard for the competing value of political community, for the cherished right of participation celebrated by generations of Antifederalists, Jacksonians, Populists, and Progressives. Especially in the last half-century, the Court has been strikingly oblivious to the value of localized politics as cement binding the communities that are the source of the nation's democratic values and traditions. Few issues indeed are so local or so trivial that elected representatives can today decide them without taking direction from the Court.<sup>293</sup> The insatiable Constitution in the hands of Justices seeking immortality has con-

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292. COX, *supra* note 36, at 102.

293. One issue left to the states is the claim for the right to die. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Vacco v. Quill*, 521 U.S. 793 (1997).



sumed from the political air much of the oxygen of power giving life to local democracy.

## VI. PRESCRIPTIONS

In their criticism of the Court as a political institution, Judge Bork and Senator Hatch, among others, have the high ground. Their specific prescriptions are, however, unsatisfactory. Most radical was William Jennings Bryant, who advocated the election of federal judges.<sup>294</sup> And Senator William Borah proposed to require a supermajority of the Court to invalidate a law.<sup>295</sup> Any such tinkering with the Court must be done with regard for traditional separation of powers and for the wisdom, incomplete though it was and is, of the Chief Justices, the UN, and the ABA.

### A. *Term Limits for Justices*

Senator Hatch, following Thomas Jefferson, proposed that all federal judges and Justices be appointed for a decade, subject to reappointment.<sup>296</sup> This proposal is overbroad in exposing trial judges and parties appearing before them to an unacceptable risk of intimidation by the executive and legislative branches. Whatever their political predispositions, it will not do to have senators and cabinet officers threatening judges with non-retention if they do not decide cases as the senators or secretaries would have them decided. Lower court judges are subject to appellate review and to a discipline system constraining their abuse of power. While these safeguards are not foolproof, they sharply distinguish trial judges from those who sit on courts of last resort.<sup>297</sup> Trial judges are not the object of the legitimate

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294. WILLIAM JENNINGS BRYANT, *THE PEOPLE'S LAW*, S. DOC. NO. 62-523, at 14 (1912).

295. 67 CONG. REC. S3959 (daily ed. Feb. 19, 1923) (statement of Senator William Borah).

296. Hatch, *supra* note 15.

297. I here ignore the problem of the intermediate court. Such institutions ought properly be regarded as an extension of the trial courts, for their primary mission is to assure the correctness of trial judge behavior. PAUL D. CARRINGTON ET AL., *JUSTICE ON APPEAL* 2 (1977). However, particularly in the federal system, circuit judges

concerns this Article addresses.<sup>298</sup>

Although term limits (but not a mandatory retirement age) for United States district judges is a bad idea, term limits for Justices of the Supreme Court of the United States is a sound one. Service on the Court for thirty and more years has now become common, and will become more so, given the increasing life span and the ability of the Court to control its workload so that its most senior members can keep up. This contributes to the intense, indeed sometimes excessive, concern for appointments to the Court: well might we be anxious and contentious when we may be stuck with a nominee forever, however bad his or her political judgment may be, or may become when he or she is affected by the dyspepsia of age.

Bringing Justices back for reappointment from time to time would force them to consider the hopes and desires of the people and to respect the prerogatives of elected legislatures and city councils when interpreting the Constitution and federal legislation. A question is whether this remedy is so strong that it would disable the Court from standing up to Congress or the President when that needs to be done to protect individual rights or other constitutionally protected interests.

The answer depends in part on the length of the term. At fourteen years, the term of the judges on New York Court of Appeals, or fifteen (the number I prefer), the need for an appropriate measure of independence might be reasonably assured. Shorter terms become increasingly unsatisfactory not only because they weaken the Court's ability to perform its legitimate constitutional role, but because too rapid a turnover in the personnel of the Court would destabilize the national law. Powerful arguments can and have been made against elective judiciaries,<sup>299</sup> but none of the generations of constitutional theorists

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prefer to think of themselves as law-givers and often behave as if that is their primary duty. To the extent that this is their role, they should perhaps be limited in the same ways that courts of last resort are.

298. H.R. 1252, passed by the House of Representatives on Apr. 23, 1998, is the initiative of Congressman Henry Hyde (R.-Ill.) and is designed to disempower federal district judges. It would restore the institution of the three-judge district court and empower parties to remove judges from a case much as they can remove jurors. These strike me as unwise provisions, although the latter may be defensible if, as appears, the courts of appeals are no longer taking full responsibility for the correction of trial court errors. *See supra* note 11.

299. *See* Croley, *supra* note 78. Croley reviews the rich literature and concludes

who have sought to explain the democratic virtues of judicial review have ever dared to advance an argument for the thirty-year term.

A Justice serving a fourteen- or fifteen-year term would have to reckon that reappointment would be the exception, for the President who nominated and the Senate who confirmed him or her would be history, and the political incentives would seem to disfavor reappointment except of those Justices who had won widely shared esteem. During much of their fourteen- or fifteen-year terms, Justices could not rationally cast votes on politically sensitive issues to secure approval of a reappointing power because they would have no way of knowing who might exercise that power. It thus seems unlikely that the Court could be overborne by Congress and the President by the threat of non-reappointment. This effect of non-reappointment on a Justice could and should be reduced somewhat by assuring the unreappointed Justice of a continuing career on a lower federal court.<sup>300</sup>

Such a term limit would have some positive bearing on the selection of nominees to the Court. There would be less reason for a President to nominate a forty-year old in the hope that the nominee would still be sitting on the Court dozens of years after the President making the nomination has subsided and gone to his or her reward.

If the prospect of non-reappointment is still regarded as too intimidating, a further compromise would be to make the long-term appointments non-renewable. This is the law in Germany for the judges of its constitutional court.<sup>301</sup> One demerit of that proposal is that it eliminates any political reward for the Justices to seek widespread esteem. On the other hand, anxiety about non-reappointment could influence the decisions of a judge seeking to assure employment in the private sector when his or her

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that judicial elections are inconsistent with constitutionalism. But neither he nor anyone he cites has suggested any reason it is desirable to keep Justices forever. The best we can do is to glorify the latter part of certain celebrated careers.

300. I have not addressed the question of term limits for circuit judges. If, as it appears, the Supreme Court is to continue to limit its role and allow the intermediate courts to sit as courts of last resort for many purposes, it follows that circuit judges, too, should be limited to fifteen-year terms in performing that role.

301. CURRIE, *supra* note 72, at 158-59.

term is over. We might split the difference one more time by allowing for one, but only one, reappointment, perhaps for a somewhat shorter term. If appointments were to be non-renewable, consideration might be given to lengthening the term to eighteen years, thus assuring that two appointments would be made in each presidential term.

An alternative to a reappointment procedure is a retention election to be conducted at the general election preceding the end of a Justice's term. There is much experience with retention elections in state systems, and judges generally regard them with favor.<sup>302</sup> The device has the great virtue of forcing Justices to think of themselves as accountable to the electorate, and not as mere agents for their counter-majoritarian impulses. Yet it does so without conferring any power over the Court on the legislative or executive branches that might be misused by senators or secretaries trying to influence the outcomes of cases.

The downside of the retention election is that it empowers interest groups with money to spend on a media blitz mischaracterizing a Justice's decisions. A frightening example of the demerit of the retention election was provided in Tennessee in 1996 when a lot of money was spent to defeat the retention of Justice Penny White with spot commercial advertising portraying her as soft on capital punishment.<sup>303</sup> Sitting Justices would be sitting ducks for such negative campaigning unless some legal constraints could be imposed on campaign methods, a solution that the Court has in recent decades, as we have noted, gone a very long way to preclude by its First Amendment jurisprudence. On the other hand, if the term is a long one as suggested, the retention election might be an acceptable compromise, despite its risks.

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302. PHILIP DUBOIS, FROM BENCH TO BALLOT: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY 13-17 (1980); see HARRY STUMPF, JUDICIAL POLITICS 138-39 (2d ed. 1998); Henry R. Glick & Craig F. Emmert, *Selection Systems and Judicial Characteristics: The Recruitment of State Supreme Court Judges*, 70 JUDICATURE 228, 229 (1987); see also Peter D. Webster, *Selection and Retention of Judges: Is There One "Best" Method?*, 23 FLA. ST. U. L. REV. 1, 34 (1995) (discussing the criticisms of retention elections and noting that virtually all judges have been routinely retained in retention elections).

303. See Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 NYU L. REV. 308, 310 (1997).

A variation is suggested by the Japanese Constitution. Newly appointed members of the Supreme Court of Japan must be confirmed not only by the Diet, but also by vote of the people.<sup>304</sup> In part because the nominee has no judicial record to attack, this confirmation is a formality. But it may have a benign influence on the process of selecting Justices and might be a useful reminder to the Justices that they serve all the people, and not merely such counter-majoritarian causes as may attract their sympathy and support. Utah, for example, employs a variation on the Japanese scheme by conducting the retention election at the next general election following the initial appointment, probably before the sitting justice has become a sitting duck.<sup>305</sup>

As an alternative to term limits, age limits are also worth considering. A minimum age of fifty for Supreme Court Justices is justified as a restraint to keep Presidents from nominating youthful Justices merely to perpetuate their influence on the Court, as may have been done at times past. A maximum age of seventy is justified as a restraint on Justices who decline to subside in a timely way, either because they cannot surrender the power they enjoy or because they wish to deny a particular President the opportunity to make a needed appointment. Between these two limits is ample time for a very useful career on the Court. A Court comprised of Justices so limited in the length of their terms would be marginally less remote from the lives of citizens and the political culture of the Republic it serves.

The Constitution may be regarded as silent on the possibility of term or age limits for Justices. It is at least arguable that Congress could impose some limits without explicit constitutional authority, as the German Bundestag has. If the Senate were, for example, prospectively to impose a fourteen-year limit on the terms of Justices by the terms of its confirmation, it is not clear how or why the Justices would resist compliance with so reasonable a restraint, especially if such a reservation were authorized by legislation enacted by both houses and signed by the President. Beyond question, the Senate could wisely refuse to con-

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304. NIHONKOKU KEMPO, art. 79, *reprinted in* 9 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 20 (Albert P. Blaustein & Gisbert H. Flantz eds., 1990).

305. UTAH CONST. art. VIII, § 9.

firm anyone who has not attained the age of fifty.

As Roger Traynor observed decades ago, there is no perfect solution to the problem of selecting and retaining judges.<sup>306</sup> What is needed is a compromise between the extreme position of absolute independence celebrated by John Marshall and the populist solution of electing judges to short terms as we elect our other politicians. Given the chronic inability of justices to restrain themselves in the exercise of their extraordinary political powers, a reform such as term or age limits is long overdue.<sup>307</sup>

### *B. A Devolutionary Amendment*

Judge Bork despairs of improving the Court by any such changes in the mode of appointment and retention of Justices. It could be that such limits might stimulate aggressive action by the Court, for the reason that the Justices would have fewer years in which to become famous.

Judge Bork's prescription is to subject constitutional decisions of the Court to review by Congress. This was a suggestion also advanced by Theodore Roosevelt,<sup>308</sup> and the Progressive Robert La Follette proposed a similar amendment, but limited it to the protection of federal legislation.<sup>309</sup> A similar idea has been advanced by Thomas Baker.<sup>310</sup>

In the form proposed by Judge Bork, congressional review seems unmanageable. Congress cannot review judicial decisions on the appellate record, nor can it write opinions. Legislative overruling, therefore, seems likely to leave much in doubt as to the scope of the decision. Supreme Court decisions could be effectively overruled by congressional revision of the constitutional text. A more workable alternative might be to amend

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306. Roger V. Traynor, *Who Can Best Judge the Judges?*, 53 VA. L. REV. 1266, 1278-82 (1967).

307. See William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693, 698 (1976).

308. 62 CONG. REC. S9074-S9077 (daily ed. June 21, 1922) (statement of Theodore Roosevelt).

309. See LEUCHTENBURG, *supra* note 193, at 83.

310. Thomas Baker, *Exercising the Amendment Power to Disapprove Supreme Court Decisions: A Proposal for a "Republican Veto"*, 22 HASTINGS CONST. L.Q. 325 (1995).

Article V of the Constitution to make it less difficult to amend. For example, Article V could allow amendments by Congress by three-fourths vote of both houses, if reconfirmed by the same supermajority of the next succeeding Congress. Supreme Court decisions could thus be overruled by congressional revision of the constitutional text. Such an amendment is freighted with some risk. The vitality of the Constitution may in important degree depend on the stability provided by the Article V process requiring the states to participate in revision.

It is less necessary to revise the Constitution to protect the validity of federal legislation from overreaching the Court. While the Court recently invalidated three federal statutes in a single term of the Court,<sup>311</sup> Congress is not altogether without means of reacting against the Court through its power over the Court's jurisdiction. State and local governments, where democracy has its roots, have been stripped of their authority and responsibility by the insatiable Constitution. All that is genuinely needed is authority in Congress to devolve some power away from the Court to shield state and local government from the Court's overconfident eagerness to displace local politics with its own.

Such a role for Congress could be fashioned by enlarging its role under Section 5 of the Fourteenth Amendment, which presently provides that "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."<sup>312</sup> This provision allows Congress to ratchet up the federal control over state institutions, but it does not appear to allow Congress to ratchet down. An appropriately devolutionary amendment might authorize a supermajority of Congress, such as that required to override an executive veto, to override a Court decision invalidating state or local legislation by explicitly authorizing the enactment and enforcement of specific laws invalidated by the Court. A plausible text might add the following language to Section 5:

Notwithstanding any other provision of the Constitution, the Congress may by vote of two-thirds of the members of each house empower the several states or their subdivisions to enact and

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311. *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Printz v. United States*, 521 U.S. 898 (1997).

312. U.S. CONST. amend. XIV, § 5.

enforce specified laws otherwise possibly violating the provisions of this Constitution, except that Congress may not authorize any state or subdivision to deny to any person within its jurisdiction the equal protection of the laws.

Such a provision retains the full authority of the Court to enforce all provisions of the Constitution applicable to the federal government, and also to prevent majoritarian state legislation that is discriminatory in the conventional sense. This last qualification is important to prevent the return of that form of "states' rights" that sheltered oppression of racial minorities. But, with that vital exception, the proposal would give Congress a role in constraining the Court. Congress could protect the authority of the states to make political decisions of the sort that the Court has been prone to make in the name of substantive or procedural due process, or other totems of natural law. Congress could, for example, to the extent that two-thirds of both houses and the President agreed, empower states to regulate advertising, pornography, flag-burning and campaign finance. It could empower states to fashion rules of civil and criminal procedure according to their own lights, and to legislatively resolve such deep moral issues as the right to life, the right to die, and the appropriate role of law in expressing sexual mores. It could empower states to impose term limits on their Congressmen and United States Senators. State and local governments would, of course, remain subject to the strictures imposed by state constitutions and enforced by highest state courts, and they would be subject to restraint by the Supreme Court of the United States except insofar as Congress by a supermajority vote intervened to protect their powers.

A purpose of such a devolutionary amendment would be to provide the needed element of vitality to our democratic traditions at the state and local levels. To the extent that a supermajority of Congress agreed, important questions that have been withdrawn from public debate could be restored to the political agenda, where in a democratic society they belong. Undeniably, there is the danger that Congress might permit states and local governments to make some bad decisions. However, as Justice Brandeis so cogently observed, states and communities would be able to learn from one another's successes



and failures.<sup>313</sup> Bad as some of those decisions might be, it would be rash to assume that many would be more imprudent than some the Court has made or will make under the present arrangement. Moreover, they could be more readily corrected. And the people would have themselves to blame for their own mistakes, not an overconfident oligarchy.

Such a provision would resemble Article 79 of the Basic Law of the Federal Republic of Germany, which allows amendment by two-thirds vote of the two houses of the Parliament. Some readers may be reluctant so to acknowledge the superiority of a foreign constitution. That Germany has had a half-century of experience with that law suggests that its serious defects would by now be apparent. Perhaps it is time for Americans to respect the experience of other nations in such matters. It is at least worth considering that the percentage of qualified German voters who exercise their franchise is roughly double that of American voters;<sup>314</sup> possible reasons are that more is at stake in German elections and that opportunities for effective participation by citizens are greater. If we embraced some part of the German experience, we might draw satisfaction from the fact that the drafting of its Basic Law proceeded from a knowledge of our experience and on the advice of Americans who at a crucial time insisted on the strengthening of its provisions regarding federalism.<sup>315</sup>

An attraction of this semi-German proposal is that it might possibly have a chance of ratification. Congress would not lose power, but would gain a bit. The state legislatures would have something to gain and nothing to lose. And it might have the support of diverse political interest groups who are unable to secure their own constitutional amendment but who might be able to marshal a two-thirds vote in Congress. Opposition would come from non-racial political interest groups presently served by intrusive decisions of the Court, who lack confidence in their ability to marshal the vote of even one-third of either House, or

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313. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

314. Eighty-six percent to forty-four percent, respectively, in the 1998 national elections.

315. On German federalism and the American influence, see CURRIE, *supra* note 72, at 33-91.

to control the outcome of democratic elections at the state or local levels. One would expect, for example, that the American Civil Liberties Union would be apoplectic if this proposal were seriously considered. As a sometimes board member of the Michigan Civil Liberties Union, that foreknowledge gives me pause. But, in my view, the Union, like the Court, has lost its bearings in failing to notice the hazards even to our civil liberties of a Constitution and a Court suffocating the democratic processes with the dictations of a ruling class.

A risk of this proposal is that it might encourage greater promiscuity by the Court in indulging its anti-democratic impulses. This would occur if the Court took unintended comfort in the possibility that its worst mistakes in limiting the powers of state and local governments could be corrected by the two-thirds vote of the legislative branch. On the other hand, it may be difficult to imagine a Court that was more indifferent to the values of self-government than the Court led by Justice Brennan.

Insofar as a devolutionary amendment would be regarded by some as an impairment of the legitimate powers of the Court, there is an additional step to be considered. This would be to fix the number of Justices at nine. The effect of such an amendment would be to settle permanently the issue of Court-packing. While this would not satisfy those who adore the Court as it is, it would be a significant gesture of respect for the institution that could be approved by those who share the concern expressed in this Article.

Such a devolutionary amendment would not go so far as Learned Hand proposed in deleting the Fourteenth Amendment Due Process Clause, but it responds to the deep concern of Holmes and imparts to the federal Constitution an element of the concept of home rule that was central to the Progressive reforms a century ago. It would serve to remind overconfident Justices that theirs is not always the final word, that they have a responsibility not only to protect minorities, but also to shelter the institutions by which all adult citizens are assured an opportunity to participate in the making of political decisions, even those about which the Justices themselves may have moral feelings. Natural law is not the law of a Republic.

## VII. CONCLUSION

These proposals entail scant risk of serious harm to the independence of the Court so essential to the effective enforcement of the Constitution. Fully justified support for the independence of that institution does not justify our failure to correct its chronic excesses. Whatever our political preferences, it is in all our interests to assure the stability of the Republic. That stability, over time, requires respect for the institutions of self-government even when they are wayward. Correction can best be made when it is not seen as a direct assault on any particular interest or any particular decision of the Court, when it can be supported by citizens of diverse political persuasions who are brought together by the ambition to restore vitality to state and local politics. Possibly this is such a time.

